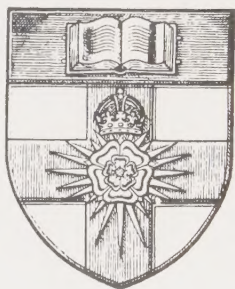


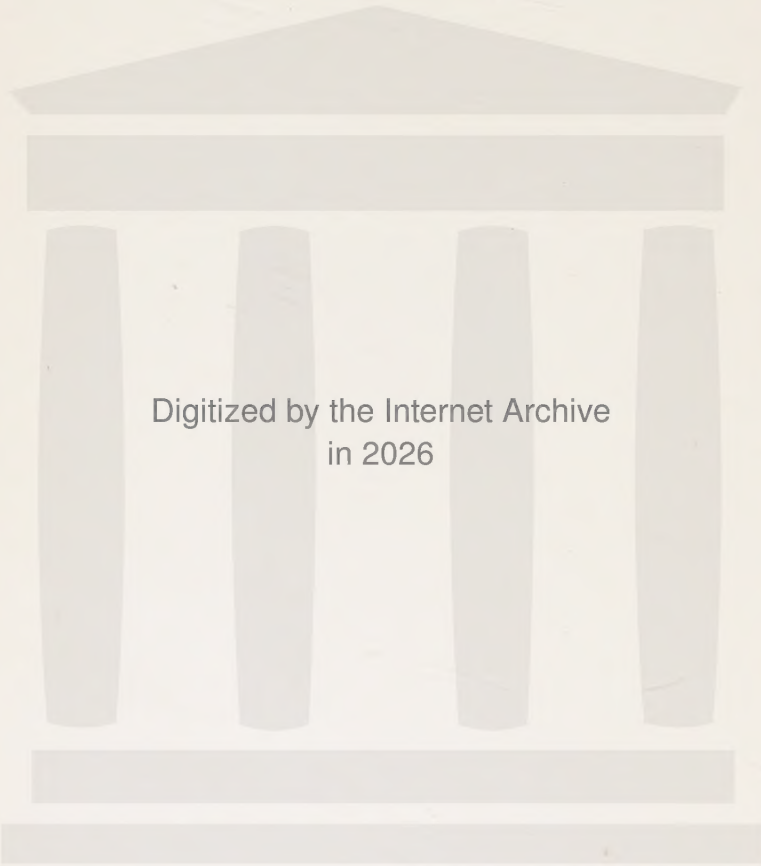
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THE CRIMINAL APPEAL REPORTS

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THE
CRIMINAL APPEAL REPORTS
1957

EDITED BY
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Recorder of Newark*

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[IN THE HOUSE OF LORDS]

BEFORE

VISCOUNT SIMONDS, LORD TUCKER AND
LORD SOMERVELL OF HARROW

1956
Nov. 15

Ex parte BLACKBURN

Appeal to House of Lords—Application to Attorney-General for Certificate—Refusal—No Duty to Re-consider Application—Mandamus—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 16 (1).

Refusal by Appeal Committee of the House of Lords to grant leave to appeal against decision of the Court of Appeal ((1956) 40 Cr.App.R. 131) in which it was held that no order of mandamus would lie directing the Attorney-General to re-consider an application under section 1 (6) of the Criminal Appeal Act, 1907, for leave to appeal to the House of Lords from a decision of the Court of Criminal Appeal, the application having been made within seven days of the dismissal of the appeal by the Court of Criminal Appeal and having been considered and refused by the Attorney-General.

Petition for leave to appeal to the House of Lords from a decision of the Court of Appeal.

The applicant was convicted at the Central Criminal Court of offences under the Prevention of Fraud (Investments) Act, 1939, and was sentenced to two years' imprisonment. He appealed to the Court of Criminal Appeal, which on March 29, 1955, dismissed his appeal (see (1955) 39 Cr.App.R. 84). Within seven days of the date of dismissal he applied to the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for the grant of a certificate authorising a further appeal to the House of Lords, but the Attorney-General refused to grant a certificate. Some time after the lapse of the seven days the applicant renewed his application to the Attorney-General,

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of Harrow

and on the Attorney-General refusing to reconsider the matter, the applicant applied *ex parte* to a Divisional Court for leave to apply for an order of mandamus directing the Attorney-General to reconsider the matter. On July 20, 1956, the Divisional Court—Pilcher and Ashworth JJ.—refused the application.

On July 23, 1956, the Court of Appeal—Singleton, Morris and Romer L.JJ.—dismissed an appeal by the applicant from that decision (1956) 40 Cr.App.R. 131.

The applicant in person.

The point of law involved is whether or not, once the Attorney-General has refused a certificate of appeal to the House of Lords, he can thereafter reconsider his decision. The Court of Appeal have held that, once he has refused a certificate, the Attorney-General is *functus officio*. It is not contended that any court can interfere with the Attorney-General's discretion. What is contended is that the Court of Appeal were wrong in deciding that, once the Attorney-General had refused to grant a certificate, he could not change his mind. The Attorney-General is under a permanent duty because he has a permanent discretion to grant a certificate at any time. Subsequent to the original exercise of his discretion in the present case, there were two decisions of the Court of Criminal Appeal, MURTAGH AND KENNEDY (1955) 39 Cr.App.R. 72 and HEPWORTH AND FEARNLEY (1955) 39 Cr.App.R. 152; [1955] 2 K.B. 600, in which it was laid down that the direction with regard to burden of proof given by Judge Aarvold in the present case was wrong. There is no fixed procedure relating to application for the Attorney-General's certificate; the application is made quite informally. If the decision of the Court of Appeal is correct, it would mean that even if the Attorney-General wished to grant a certificate after having originally refused one, he could not do so.

[VISCOUNT SIMONDS: You seek to distinguish between, on the one hand, an application made within time and a second

application made out of time and, on the other hand, an application made within time and disposed of and a representation made at any later time in regard to that application.]

Exactly.

[LORD TUCKER: The difficulty I feel about that is that, where an application is made within seven days and refused, there is an end of the application. Unless there is some procedure for enabling a fresh application to be made to reconsider or re-open the original refusal, the second application must either be an application to reconsider the original one or it must be a new application.]

Suppose the Attorney-General in a state of great pressure of work or a constitutional crisis by mistake refused an application, could he not change his mind about it? It is not suggested that the Attorney-General could be ordered to do more than consider a fresh application. If he has the power, he must have a correlative duty.

[VISCOUNT SIMONDS: Would it not, on your argument, be open to the Director of Public Prosecutions at any time, even though an appeal had been allowed by the Court of Criminal Appeal and a verdict of acquittal entered, to bring to the notice of the Attorney-General some fresh point which he thought ought to have been considered even after the lapse of a considerable time? Throughout our history finality in the administration of criminal law has been regarded as of great importance. One must consider the importance of finality in construing the Criminal Justice Act, 1925.]

It must be conceded that the Director of Public Prosecutions would have that power. It is, however, scarcely conceivable that a prosecutor would ask for, or the Attorney-General grant, a certificate against a verdict of acquittal by reason of the decision of the Court of Criminal Appeal some time after it.

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VISCOUNT SIMONDS: We have listened to the applicant's

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very careful argument and have fully considered it, but we are not satisfied that he has made out a case for bringing an appeal. The petition must, accordingly, be refused.

Ex parte
BLACKBURN

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of Harrow

Petition refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
AND MR. JUSTICE LYNSEY

1957
Jan. 21

PRACTICE NOTE

JUROR—FORM OF OATH

THE LORD CHIEF JUSTICE: We wish to call the attention of Courts of Quarter Sessions to a new form of jury oath now in use at the Central Criminal Court and which will probably soon be used on all the circuits. Experience at the Central Criminal Court, where so many jurors have to be sworn during the year, and indeed at other courts has shown that jurors frequently find a difficulty in reading aloud the present form of oath, probably mainly due to the juxtaposition of the words "will well" in the phrase "will well and truly try." There is no statutory form of oath and any formula may be used which sufficiently prescribes the obligation imposed. The judges have approved the revised form, which was suggested by the Recorder of London and which has been found to remove any difficulty. It is: "I swear by Almighty God that I will faithfully try the several issues joined between Our Sovereign Lady the Queen and the Prisoner at the Bar and give a true Verdict according to the evidence." While we

have no power to direct Quarter Sessions to adopt this form, we commend it to their consideration, as uniformity in these matters is desirable.

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PRACTICE
NOTE (FORM
OF OATH)

Goddard,
L.C.J.,
Cassels J.,
Lynskey J.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
AND MR. JUSTICE LYNSEY

WILLIAMS AND OTHERS *v.* PHILLIPS
ROBERTS AND OTHERS *v.* PHILLIPS

1957
Jan. 21

*Larceny—Refuse—Dustmen—Agreement with Corporation on
Division of Proceeds of Sale—Property Placed by Dustmen in
Sacks in Corporation Dust-cart—Subsequent Sale by Dustmen.*

The appellants, who were dustmen employed by a Corporation, were convicted of larceny of refuse collected by them from factories and other places. An agreement between the union to which the appellants belonged and the Corporation, which was exhibited at premises of the Corporation and of which the appellants were aware, provided that any sums obtained from the sale of refuse should be divided proportionately between the Corporation and the dustmen, and the dustmen were warned by notices, which the appellants had read, that if, apart from the agreement, they appropriated refuse which the Corporation had sent them out to collect, criminal proceedings would be taken. Refuse, including rags and wool, was collected by the appellants and put into sacks and the sacks were placed in the Corporation's dust-carts, and then taken and sold by the appellants instead of being handed over to the Corporation's officials. In the first, but not the second, case there was a specific finding that the sacks were the property of the Corporation.

Held, that (i) the refuse had not been abandoned by the owners of the premises when placed in the dustbins, but put

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WILLIAMS
AND OTHERS
v. PHILLIPS,
ROBERTS
AND OTHERS
v. PHILLIPS

Goddard,
L.C.J.,
Cassels J.,
Lynskey J.

there for the specific purpose of being collected and taken away by the local authority; and (ii) the refuse passed into the constructive possession of the local authority as soon as it was placed in their carts; and (iii) there was abundant evidence of *animus furandi* on the part of the appellants in view of their knowledge of the agreements and notices. The appellants were, therefore, properly convicted of larceny.

SPEARS (1798) 2 Leach 825 and REED (1854) 6 Cox 284 applied and followed.

Cases stated by Bristol justices.

At Bristol Magistrates' Court informations were preferred by the respondent Phillips, a police officer, charging the first appellant, Henry Charles Williams, and two other persons with larceny of refuse belonging to the Bristol Corporation. Similar informations charged the second appellant, William Roberts, and two other persons with similar offences. All the persons charged were dustmen employed by the Corporation.

An agreement between the union to which all the persons charged belonged and the Corporation provided that the proceeds of the sale of refuse collected by the dustmen employed by the Corporation should be divided proportionately between the members of the crew and the Corporation. That agreement was exhibited at the Corporation premises, as were notices warning dustmen that if, apart from the agreement, they appropriated refuse which they had been sent out to collect on behalf of the Corporation, criminal proceedings would be taken. The appellants were aware of the agreement and had read the notices. In each case refuse, including rags and wool, had been collected by the appellants from factories and other premises. The refuse was then put by the appellants into sacks, which were placed on the Corporation's dust-carts. In the first, but not the second, case there was a specific finding that the sacks belonged to the Corporation. In each case, instead of taking the refuse back to the Corporation yard and there handing it over to the proper officials, the appellants took it from the carts and sold it themselves.

The justices convicted and fined the appellants, who appealed.

Henry Newman, for the appellants.

N. R. Blaker, for the respondent.

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WILLIAMS
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v. PHILLIPS,
ROBERTS
AND OTHERS
v. PHILLIPS

Goddard,
L.C.J.,
Cassels J.,
Lynskey J.

THE LORD CHIEF JUSTICE: These are two cases stated by justices for the City of Bristol, before whom several of the dustmen employed by the Corporation were convicted of larceny. It is a class of case which is not altogether unfamiliar in these courts. For a long time past local authorities, realising that there is often a considerable value in refuse which has to be collected from factories or elsewhere, have determined that it is not to be appropriated by the dustmen themselves. There is in fact, as is found in this case, an agreement between the union and the Corporation, though that has not any very great bearing on the question whether a criminal offence was committed except as showing whether the appellants were acting honestly or dishonestly. The agreement is to the effect that any value there is found to be in the sale of refuse is to be divided between the members of the crew and the Corporation, the Corporation taking one part and each member of the crew taking another part. That agreement is exhibited at the Corporation premises and the employees are warned that if, apart from this agreement, they appropriate the refuse which they are sent out to collect on behalf of the Corporation, criminal proceedings will be taken.

What happened in both these cases was that the dustmen had gone out and collected refuse of one sort or another from various places. In both cases what they had collected was wool rags, and no doubt there is value in wool rags because they can be used for the purposes of shoddy. The first case shows that the refuse which was collected, including these rags and wool, was put into bags which were the property of the Corporation and then put into the Corporation's carts. The only difference I can see in the second case is that there is no direct finding that the refuse was put into sacks belonging to the Corporation, but it was put into sacks. I am quite willing to assume for the purposes of this judgment that in that case the sacks were not the sacks of the Corporation. They were

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Cassels J.,
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undoubtedly put into the Corporation dust-cart. In each case, instead of taking this refuse back to the Corporation yard and there handing it over to the proper officials who would then have dealt with it in accordance with the agreement, the appellants took it themselves. There was also some scrap metal which they took and sold. The question is whether they were guilty of larceny.

The first point that is taken here, that the property was abandoned, is on the face of it untenable. Of course, that is not so. If I put refuse in my dustbin outside my house, I am not abandoning it in the sense that I am leaving it for anybody to take it away. I am putting it out so that it may be collected and taken away by the local authority, and until it has been taken away by the local authority it is my property. It is my property and I can take it back and prevent anybody else from taking it away. It is simply put there for the Corporation or the local authority, as the case may be, to come and clear it away. Once the Corporation come and clear it away, it seems to me that because I intended it to pass from myself to them, it becomes their property. Therefore, there is no ground for saying that this is abandoned property. As long as the property remains on the owner's premises, it cannot be abandoned property. It is a wholly untenable proposition to say that refuse which a householder puts out to be taken away is abandoned. Very likely he does not want it himself and that is why he puts it in the dustbin. He puts it in the dustbin, not so that anybody can come along and take it, but so that the Corporation can come along and take it. Once the servants of the local authority have come and taken it and put it in the Corporation's carts, it seems to me beyond any question that it is in the constructive possession of the Corporation. If authority is needed for this point, and it seems to have been discussed in cases, there is the case of *SPEARS* (1798) 2 Leach 825, which at one time seems to have caused a little difficulty because there were two reports—the one to which I have referred and one in 2 East P.C. 568—which

did not entirely coincide; but in the case of *REED AND ANOTHER* (1854) 6 Cox 284, before the Court for Crown Cases Reserved, this very point was taken, and the offence was said not to be embezzlement, but larceny. Here, Mr. Newman says that these appellants ought to have been convicted of embezzlement, if anything. The headnote to that case is: "A servant being sent by his master to fetch coals from a wharf, where the master dealt, went with his master's sacks and cart for that purpose, and received the coals in the sacks, which, when filled, were deposited in the cart. On his way home he fraudulently abstracted from the cart some of the coals. Held, that as soon as the coals, which were the property of the master, had been deposited in the master's cart, the exclusive possession of the servant was determined, and that a constructive possession of the master began, the servant, thenceforward, having only the mere charge or custody of the coals as a servant; consequently the servant committed a trespass in taking them from the cart, and was properly convicted of larceny." I observe that Lord Campbell said (at p. 288): "The constructive possession of the master need not be distinct from the actual possession of the servant." The servant takes the actual possession, puts them in the master's cart which the master has sent for that purpose, and therefore the constructive possession is in the master. In fact the possession is in the master, so that objection fails.

The only other question can be whether there was *animus furandi*. That was entirely a question for the justices and, in view of the circumstances and the fact that they find that the appellants knew all about the agreements and knew of the notices that had been put up, I do not see that the justices could have come to any other finding than that the appellants had an *animus furandi*. It is not necessary to talk Latin in these cases and use expressions like *animus furandi* or *animo furandi*. The question is: were they acting honestly? That is the test. Of course, they were not acting honestly. They knew perfectly well what their duty was, what they had to do

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with this refuse, and that if they appropriated it to their own use they were stealing it. That is what the justices have found. It was essentially a question for the justices, and there was evidence on which they could find it, and this court cannot interfere. We do not sit as a court of quarter sessions. We sit here to answer the questions submitted to us and on the facts found by the justices there was abundant evidence on which they could find as they did, and we cannot interfere.

Some attempt was made to distinguish Roberts' case from Williams' case on the ground that it was said the property in Roberts' case had been given by the factory owners to the appellants. I do not deny that a householder when the dustman comes round can say to him: "Here is a particular thing; I am giving it to you for your own special use." If the man put it into his pocket after that, I dare say that would not be larceny, because the householder who has still possession of the refuse can, if he chooses, give one particular portion to the dustman and say: "I am giving that to you as a present." It is just the same as if he were giving a Christmas box. That would not be larceny, but there is no indication in the findings of the justices that that is what happened here. I think what they were meaning to find here was that at one place where the appellants called for the refuse some of it was in the dustbin, some of it was brought out and given to them and some collected from the side of the dustbin. At any rate, this point was never canvassed before the justices.

For these reasons, I think the justices perfectly properly convicted in both cases and these appeals fail and are dismissed with costs.

CASSELS J. I agree.

LYNSKEY J. I agree.

Appeals dismissed.

Solicitors: Capel Cure, Glynn, Barton & Co., agents for R. H. Gould, Parr & Co., for the appellants; Robins, Hay & Waters, agents for Alexander Pickard, Town Clerk, Bristol, for the respondent.

[IN THE HOUSE OF LORDS]

BEFORE

VISCOUNT SIMONDS, LORD MORTON OF HENRYTON,
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*Conspiracy—Conspiracy in England to Defraud Abroad—Issue of
Licence by Government Department—Intent to Defraud.*
*Conspiracy—Conspiracy to Utter Forged Documents—Posting in
England of Letter Enclosing Forged Document—Uttering—
Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 6 (2)).*

A conspiracy in England to commit a crime abroad is not indictable in England unless the crime contemplated is one for which an indictment would lie in England.

The conspiracy charged in one count of an indictment was a conspiracy to defraud an authority established by the Government of Western Germany to control the export of metals, by causing that department to grant licences for export of metals by fraudulent misrepresentations that the metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Eastern European countries, and the evidence showed that the representations were designed to be made in Germany and licence obtained there.

Held, by the House of Lords (affirming the decision of the Court of Criminal Appeal) that, though such conspiracy was to be regarded rather as a conspiracy to obtain a lawful object by unlawful means rather than a conspiracy to commit a crime, no indictment for such a conspiracy would lie in England, since the unlawful means and the ultimate object were both outside the jurisdiction.

Per the House of Lords. Such a conspiracy would be indictable if the acts were designed to be done and the object were to be achieved in England, as a Government Department would act to its detriment and be defrauded if it issued a

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licence which enabled something to be done which it was charged with the duty to prevent.

On a further count which charged a conspiracy to utter forged documents, the evidence showed that letters enclosing the forged documents were posted in London to an address in Germany.

Held by the Court of Criminal Appeal that the posting of a letter containing a forged document amounts to an uttering of the forged document within the meaning of section 6 (2) of the Forgery Act, 1913; and that, as there was evidence to show that the alleged object of the conspiracy was in fact carried out in England, an indictment for the conspiracy would lie in England; further, that the indictment would still have lain, apart from such evidence, if the alleged object of the conspiracy might have been carried out in England.

Quaere (*per* the House of Lords), whether a conspiracy in England which is intended wholly to be carried out abroad may not be indictable in England on proof that its performance would produce a public mischief in England or injure a person in England by causing him damage abroad.

Appeal by the Crown from an order of the Court of Criminal Appeal allowing in part appeals by the defendants against convictions and sentences.

The defendants, Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith together with a man named Hamson, were charged at the Central Criminal Court before Donovan J. on an indictment containing six counts. The first two counts charged them with conspiracy to commit a common law misdemeanour, by conspiring in London and elsewhere together and with other persons to acquire lead, steel and copper in the Federal Republic of Germany by means of forged documents purporting to show, and by fraudulent misrepresentations, that the metals would be consigned to, used in and not re-exported from the Republic of Ireland, when in fact the metals were intended to be consigned and sold to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R. and thereby to evade the provisions of the Control of Goods (Import Certificates) Order, 1951, and to prejudice the interests of honest English traders in such metals. The third count charged the defendants with conspiracy to defraud by conspiring in London and elsewhere with

each other and with a company named Austay London, Ltd., and with other persons unknown to defraud an export control department of the Federal Republic of Germany known as and referred to as Z.A.K. by causing Z.A.K. to grant licences to export certain metals from the Federal Republic of Germany and by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R. The fourth count charged a conspiracy in similar terms with regard to a consignment of lead alleged to be destined for Denmark, which was in fact exported to Czechoslovakia. The fifth count charged the defendants and Hamson with conspiracy with each other and with the aforementioned company and with persons unknown to utter forged documents purporting to be "end-user certificates" from a Department of the Republic of Ireland certifying that such metals would be imported into the Republic and would not be exported therefrom, knowing them to be forged and with intent to defraud. The sixth count charged Owen only with uttering one of these certificates. The trial took place on May 8, 9 and 10, 1956. On motion by counsel for the defendants Donovan J. quashed counts 1 and 2 (see (1956) 40 Cr.App.R. 103) and the trial proceeded on the remaining counts. Donovan J. discharged the jury from giving a verdict on count 4. The jury convicted the defendants on counts 3 and 5, the defendant Hamson on count 5, and the defendant Owen also on count 6. The defendant Owen was sentenced to concurrent terms of four years' imprisonment on counts 3 and 5, and two years' imprisonment (concurrent) on count 6. The defendant Seth-Smith was sentenced to concurrent terms of three years' imprisonment on counts 3 and 5, and Hamson to two years' imprisonment on count 5. Donovan J. gave the defendants Owen and Seth-Smith a certificate for appeal on the question of law whether a conspiracy in England to effect an unlawful object abroad is indictable in England.

The hearing before the Court of Criminal Appeal—the Lord Chief Justice, Mr. Justice Ormerod and Mr. Justice Ashworth—

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took place on July 23 and 24, 1956—and the court reserved judgment.

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Neil Lawson, q.c. and Sebag Shaw, for the appellant Owen.

A. D. Karmel, q.c. and I. C. Baillieu, for the appellant Seth-Smith.

Neville Faulks and David Hirst, for the Crown.

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Cur. adv. vult.

Oct. 2, 1956. The following judgment of the court was read by

THE LORD CHIEF JUSTICE: Both the appellants were convicted before Donovan J. at the Central Criminal Court on two counts of an indictment, the first of which charged them, in substance, with conspiracy to defraud Z.A.K., which was an authority established by the Government of Western Germany to control the export of metals, that is, to cause Z.A.K. to grant licences to export metals from Germany by fraudulently representing that the metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Eastern European countries, commonly described as those behind the Iron Curtain. The other count charged them with conspiracy to utter forged documents purporting to be "end-user certificates" made and given by a Government department in Ireland certifying that the metals would not be re-exported, knowing the same to be forged and with intent to defraud. Owen was also convicted on a third count charging him with uttering one of these forged end-user certificates. The learned judge granted a certificate of appeal on the ground that the conviction raises an important point of law not apparently covered by existing authority, namely, whether a conspiracy in England to effect an unlawful object abroad is indictable in England.

The conspiracy and the method adopted to effect it can be quite shortly stated. The German Government would not grant licences for the export of strategic metals to Eastern

European countries. The appellants were directors of a company called Austay London, Ltd. and Seth-Smith was chairman of an Irish company called Smith Miller (Eire), Ltd. Austay, Ltd. bought metal in Germany and the appellants put false documents before Z.A.K., the licensing authority of the German Government, purporting to show that the metal would be exported only to Ireland, whereas in fact it was to be exported to "Iron Curtain" countries. They also obtained through Smith Miller (Eire), Ltd. and presented to Z.A.K. documents which are known as end-user certificates which purported to be given by a Government department of Eire certifying that the metal would not be exported from, but would be used, in Ireland. These documents, six of which were proved in evidence, were bought for a substantial sum of money from a person named Higgins, who apparently carried on a business in Dublin of supplying forged certificates.

It is not altogether easy to appreciate what offence it was intended to allege in the first of these counts, which was called throughout the case count 3, as distinct from that alleged in the other, called count 5. The evidence would seem to be identical on both counts. Presumably count 3 was intended to refer to the fraudulent representations as to the destination of the goods and to the false shipping documents used in support, while count 5 is confined to the forged end-user certificates subsequently produced in support of the earlier representations. With regard to count 3 the court has felt considerable doubt whether it was right to charge an intent to defraud and not an intent to deceive. According to the well-known definition given by Lord Wrenbury in *LONDON AND GLOBE FINANCE CORPORATION, RE* [1903] 1 Ch. 728 at p. 732, to deceive is by falsehood to induce a state of mind and to defraud is by deceit to induce a course of action, that is to induce a man to act to his injury; in other words, to deprive by deceit. It may well be doubted whether a Government department can be said to act to its injury merely by issuing a certificate which it would not have granted had the true facts been known.

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Certainly it has not been deprived of anything. It is, however, unnecessary to decide this point because of the view the court has formed on the main question raised by the certificate of appeal granted by the learned judge. The case put forward by the prosecution on count 3 was that a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country and the case was argued both at the trial and in this court on that footing. This question has never been authoritatively decided, though it has on different occasions been raised and has been the subject of discussion by text writers of authority and now falls for express decision. There is no doubt that a conspiracy is indictable here if an agreement is made within the jurisdiction to do an unlawful act, or to do a lawful act by unlawful means, in either case within the jurisdiction, whether the agreement is carried into effect or not. As soon as agreement is reached, the very plot is an act itself and is indictable: **MULCAHY** (1868) **L.R.** 3 **H.L.** 306.

The question, however, remains whether it is indictable if the unlawful act is to be effected outside the jurisdiction. Another principle of English law is that, apart from express statutory provision, offences committed by British subjects out of England are not punishable here by the criminal law. This matter was discussed and the authorities considered in the recent case of **PAGE** (1953) 37 **Cr.App.R.** 189; [1954] 1 **Q.B.** 170, and we need not further enlarge upon it. The only statutory provision relating to conspiracy to commit a crime is section 4 of the Offences against the Person Act, 1861. Conspiracy in this country to murder any person abroad, whether within the Queen's domains or not and whether the person is or is not a subject of the Queen, is a misdemeanour punishable with a maximum of ten years' imprisonment. Now certainly since 33 **Hen.** 8, c. 23, a British subject had been indictable in this country for murder committed abroad and the Offences against the Person Act, 1828 (9 **Geo.** 4, c. 31), expressly provided for the trial of any of His Majesty's subjects charged in England with murder committed on land out

of the United Kingdom whether within the King's Dominions or without. It follows that being an accessory to murder abroad or conspiracy to murder abroad is indictable in this country. Section 4 of the Act of 1861 did not therefore add to or alter the common law on the subject; it provided a special penalty and made it clear that a conspiracy by anyone in this country was indictable. The section, in fact, follows closely except as to penalty the Conspiracy to Murder Bill which had been introduced in 1858 by Lord Palmerston in consequence of what was known as the Orsini bombs conspiracy. The bill sought to make the offence a felony punishable with a maximum of penal servitude for life and also to settle an acute controversy which had arisen as to whether it was an offence for foreigners to conspire in this country to commit murder abroad. The Attorney-General, Sir Richard Bethold, afterwards Lord Westbury, contended that it was not, but this opinion was strenuously opposed by Lord Campbell. The bill was defeated in February of that year on second reading, and led to the fall of the Government. In the following April, Simon Bernard was charged with being an accessory to the murder of persons in France, and Lord Campbell, in his charge to the grand jury, referred to the Act of Geo. 4 cited above and laid down that foreigners who became in this country accessories to murder abroad were just as responsible to the law as British subjects would be. The case of BERNARD (1858) is fully reported, including the charge of the Lord Chief Justice, in 8 St.Tr.(N.S.) 887. Lord Campbell intimated that the question would, if necessary, be reserved for the consideration of the fifteen judges, but, as the verdict was one of acquittal, this could not be done. In the same volume (8 St.Tr.(N.S.) 1091) is the report of TCHORZEWSKI, where the defendant was charged with publishing a seditious libel in French with the object of inciting people in France to kill the Emperor. The Attorney-General, who by this time was Sir Fitzroy Kelly, elected to offer no evidence, in spite of Lord Campbell's evident disapproval of that course. The

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Lord Chief Justice took the opportunity of saying that he hoped foreigners resident here would remember that it is a crime for a British subject or a foreigner resident here to conspire for the commission of a crime in a foreign country, but this must be regarded as no more than an *obiter dictum*; the case had not been argued and cannot rank as a decision and does not seem ever to have been followed or even quoted. It is, in our opinion, clear that section 4 of the Act of 1861 did not create a new offence. It merely dealt with the sentence applicable to an already existing offence. Accordingly, there is no ground for arguing that as Parliament had expressly provided for the case of conspiracy to murder abroad, it followed by applying the maxim "*expressio unius exclusio alterius*" that it was only in relation to murder that a conspiracy to commit a crime abroad was indictable in this country. Both before and since the Act of 1861 the question has been whether the substantive offence alleged in the conspiracy was triable here.

We turn now to KOHN (1864) 4 F. & F. 68. The defendant, a Prussian and captain of a Prussian merchant ship, was indicted for a conspiracy at Ramsgate with the owner and mate to cast away and destroy the ship to the prejudice of the underwriters. The ship was in fact sunk far from the English coast and so out of the jurisdiction. Willes J. directed the jury that a conspiracy in this country to commit the offence was criminal by our law, but that the case did not raise the point which arose in BERNARD'S CASE (*supra*) as to a conspiracy limited to a criminal offence to be committed abroad, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which was within the jurisdiction; and he concluded his charge by saying that for the principal offence, that is the casting away, he could not be indicted here as he was a foreigner, the ship was foreign and the offence was committed on the high seas, but the question was whether there was a conspiracy here to destroy the ship whether at sea or in port. He is, however, reported as

saying that the offence of conspiracy would be committed by persons conspiring together to commit an unlawful act to the prejudice of others if the conspiracy was in this country though the overt acts were abroad. The case is not very satisfactorily reported, but, taking the report together with the note of the learned reporter, it seems that the learned judge meant to lay down (1) that an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (2) that to conspire to scuttle out of the jurisdiction is not indictable; but that (3) to conspire to scuttle whether the ship should be within or without the jurisdiction is indictable, as the ship might be scuttled in an English port or within English territorial waters; (4) that to conspire to injure persons within the jurisdiction by doing an act out of the jurisdiction is indictable. This would seem to be the opinion also of Sir James Fitzjames Stephen, though he says in Volume II, p. 13 of his *History of the Criminal Law* that he abstains from giving a decided opinion because the question as to conspiracy to commit a crime abroad remains unsettled and may be raised judicially. He puts as a strong argument that the criminal law of England does not deal with crimes committed abroad at all, and submits that, if incitement to commit crimes abroad is to be made criminal, it should be done by legislation and not judicial decision. In that well-known and authoritative work, Wright on the *Law of Criminal Conspiracies and Agreements*, the learned author, afterwards a judge of the Queen's Bench Division, points out that the modern law of conspiracy is in truth merely an extension of the law of attempts, and at p. 74 of the book, after referring to KOHN (*supra*), says that if the contemplated act when done will not by reason of the place and the nationality of the actors be punishable here there would be much difficulty in holding criminal an agreement here for doing that which when done would not be a crime against our laws. Now, clearly if two Englishmen commit a burglary in France they cannot be indicted for that crime in England. It would certainly

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seem illogical to hold that by agreeing to go to France to commit the offence they are guilty of a crime against our laws. But there are certain acts which by statute are crimes punishable in England wherever committed. Instances are murder, bigamy, offences against the Foreign Enlistment Act, 1870, the Official Secrets Acts and the Merchant Shipping Acts. The statutory exceptions are all collected on pp. 29 *et seq.* of Archbold, 33rd ed. In our opinion, the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here, because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For instance, if two persons agreed here to stage a sham burglary abroad in order to collect insurances from English underwriters, the conspiracy would be indictable here, though the overt act was to be done abroad, because, if the plot were carried out, the obtaining or attempting to obtain the insurance money would be clearly indictable. In the present case the plot, though formed here, was carried out in Germany and assuming, as we have, that Z.A.K. were defrauded and not only deceived, the persons defrauded were Germans in Germany. In our opinion, no offence was committed in Germany for which the appellants could have been indicted in England and consequently in our opinion the conspiracy is not indictable.

It was further argued that a conspiracy to effect a civil wrong is indictable and that the evidence disclosed a fraud for which Z.A.K. could have sued in this country. It is no doubt true that a conspiracy to commit a civil wrong in this country is indictable even though the wrong has not been effected; but we know of no case where it has been held that a conspiracy to injure a person abroad is indictable here, though it may be it is if some interest of his in this country is affected.

Much reliance was placed below on **WARBURTON (1870) L.R. 1 C.C.R. 274**, and it is necessary, therefore, to see exactly what that case did decide. The facts were that there was a partnership consisting of Warburton and one Lister who traded in the West Riding and also had a branch business in Cologne carried on there by managers. Warburton conspired with the managers in Cologne to fabricate documents and accounts there with the object of depriving Lister of his proper share in the partnership. These documents and accounts were to be produced to Lister in this country and would have constituted false and fraudulent representations as to what was due to him with the object of injuring or depriving him of his equitable rights in the partnership. While the material was fabricated abroad, the fraud would have been carried out here and it was never even suggested in argument that, because the conspiracy took place abroad, that could have any bearing on the matter. The actual decision seems to have been that a conspiracy to injure was indictable though the injury was to equitable and not legal rights. If it is not indictable to conspire to commit a particular crime abroad, it would be impossible to hold that it becomes indictable if that crime also amounts to a civil wrong. Moreover, we are unable to see that in this case **Z.A.K.** would have had cause of action in this country. Conspiracy or deceit alone gives no cause of action. As in all actions on the case, it is damage which is the gist of the action. **Z.A.K.** were deprived of nothing; they were tricked into giving a licence which may well have been a crime in Germany, but we do not see that they suffered any damage for which an action would lie in this country. In our opinion the conviction on count 3 must be quashed on the ground that the offence which the appellants conspired to commit was one to be committed abroad and one which would not have been indictable in England.

We now pass to count 5. This count charged the two appellants and **Hamson** with conspiring together and with **Austay London, Ltd.** and with other persons unknown to utter

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forged documents purporting to be end-user certificates, knowing the same to be forged and with intent to defraud. All three men were convicted. The first point taken on behalf of the appellants was similar to that taken in regard to count 3, namely, that the offence which the appellants conspired to commit was one to be committed abroad and would not have been indictable in England. The alleged object of the conspiracy was the uttering of forged documents, knowing them to be forged and with intent to defraud, and it, therefore, becomes necessary to consider, first, what constitutes uttering and, secondly, where uttering takes place.

Section 6 (2) of the Forgery Act, 1913, provides as follows :
 “ A person utters a forged document, seal or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document, seal or die, uses, offers, publishes, delivers, disposes of, tenders in payment or exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the said forged document, seal or die.” Although for the purposes of this count it was not necessary for the prosecution to prove that any of the forged documents was in fact uttered within the meaning of that subsection, evidence was tendered to show that of the six forged documents three were enclosed in letters from Austay London, Ltd. to Z.A.K. Each of these letters appeared to show that the appellant Owen had dictated it, as his initials were typed upon it. As the original letters were not available at the trial, there was no direct evidence to prove that any of them had been posted to Z.A.K., but a carbon copy of each letter was found in the files of Austay London, Ltd. and in the absence of any evidence to the contrary it was open to the jury to infer that each letter with its enclosed forged document was sent in the normal course of business by post to Germany.

It was contended for the appellants that the posting of a letter enclosing a forged document does not constitute an uttering of the document within the meaning of the Act and that the uttering (if any) occurs when the letter is received

and opened by the addressee. A similar contention was put forward in FINKELSTEIN (1886) 16 Cox 107, and although the case is only shortly reported, it is plain that Stephen J. was of opinion that the posting in London of forged bonds in a letter addressed to a company in Brussels constituted an uttering of the bonds in London. The earlier decision of GILES (1827) 1 Moo.C.C. 166, is to the same effect. Apart from authority, the statutory definition already quoted is in sufficiently wide terms to include within its scope the posting of a letter containing a forged document.

It follows, therefore, that there was evidence to show that the alleged object of the conspiracy was in fact carried out, and carried out in London. But even if such evidence had not been tendered, it is clear that the alleged object of the conspiracy might have been carried out in this country, for example, by personal delivery of the forged documents to representatives of Z.A.K. or the German companies who might be in London. In such circumstances it is clear from KOHN (*supra*) that the appellants could properly be indicted in this country.

It was also contended for the appellants that the learned judge failed to direct the jury adequately as to the difference between a false document and a forged document, or as to the necessity of establishing knowledge on the part of the appellants that the documents in question were forged. There is no substance in this contention. The fact that the documents were forged was not seriously challenged at the trial and on several occasions in the course of his summing-up the learned judge emphasised the point that the jury could not convict either appellant unless they were satisfied that he knew that the documents were forged.

The only other point in regard to this count of the indictment relates to the alleged intent to defraud. The same argument was put forward as was relied on in regard to count 3, but it is to be noted that in regard to count 5 the intent to defraud is alleged in general terms and is not directly related

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to Z.A.K. Even if it were right that no intention to defraud Z.A.K. was or could be established, it is clear that German suppliers were to be defrauded by means of the conspiracy alleged in count 5, and in these circumstances it was open to the jury to take the view that an intent to defraud was proved.

Count 6 charged the appellant Owen alone with a single offence of uttering a forged document, knowing the same to be forged and with intent to defraud. For the reasons given in respect of count 5, it was open to the jury to convict this appellant on this count and it is unnecessary to discuss the matter further.

Although no appeal against sentence was included in the notices, counsel asked us, in the event of the appeal being allowed in whole or in part, to reconsider the sentences of four years on Owen and three years on Seth-Smith, and the court agreed to do so. Had the learned judge taken the same view as we have done on count 3, we do not think he would have passed these sentences. We have come to the conclusion that as the conviction on count 3 is quashed and, as the maximum sentence for uttering the documents charged in counts 5 and 6 is only two years, there should be a reduction. Discreditable as was the appellants' conduct, we do not feel that this is a case in which a longer sentence should be imposed for conspiracy to commit an offence than could have been given for the substantive offence. In any case the maximum sentence that could have been passed on Owen in respect of count 6 was only two years, while the sentence passed was actually one of four years concurrent with the sentence passed on counts 3 and 5 for conspiracy. In all the circumstances we think the sentence on Owen should be two years on counts 5 and 6 concurrent and on Seth-Smith eighteen months. The sentences will date from conviction.

There remains the question of costs. The appellants have succeeded in their appeal as regards count 3. This raised an exceptionally difficult point of criminal law hitherto undecided, and was strenuously resisted by the Crown. Consequently,

we think it only fair that the appellants' costs should be taxed and they should each receive one half.

With regard to the defendant Hamson, as we have reduced the sentences in these cases, the court will give leave to him, if he desires, to appeal against sentence out of time.

Convictions quashed in part.

Sentences reduced.

On October 15, the court reduced the sentence passed on Hamson from two years' to twelve months' imprisonment.

The Attorney-General granted the Crown a fiat for a further appeal to the House of Lords, where the hearing took place on November 19, 20, 21, 22 and 26, 1956.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), for the Crown.

The appeal raises two main issues: (1) Can an indictment be presented in this country for a fraudulent conspiracy which would be triable here if the fraudulent acts were to be done in this country, when in fact the fraudulent acts were to be done outside the United Kingdom? (2) What is meant by the expression "intent to defraud"? It is well established that the crime of conspiracy consists of an agreement to do an unlawful act, or a lawful act by unlawful means, and that the agreement itself constitutes the offence (MULCAHY (1868) L.R. 3 H.L. 306 at p. 317). If the judgment of the Court of Criminal Appeal is correct, this general principle must be read subject to the proviso that if the unlawful end is to be attained abroad, or the unlawful means used abroad, the agreement is not a criminal conspiracy. The Court of Criminal Appeal were wrong in directing their minds to the locality of the acts contemplated as opposed to the character of the agreement itself.

The appellants' propositions are as follows: (a) whether an agreement made in this country is indictable depends on the character of the agreement itself. If it is clear that the agreement is to obtain something by fraud or the use of

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forgery, the agreement is indictable as a conspiracy, and it is immaterial whether the fraudulent acts are to be done inside or outside this country. The crux of the crime of conspiracy is the character of the agreement, not the locality of the acts to be performed. If the above proposition is too wide, then at least (b) a conspiracy is indictable if the acts contemplated would be criminal if committed here, and would also be criminal in the country where they are to be committed; or (c) if the acts contemplated would be a civil wrong actionable in England.

The crucial importance of the character of the agreement was emphasised by Lord Simon in *CROFTER HAND WOVEN HARRIS TWEED CO., LTD. v. VEITCH* [1942] A.C. 425 at p. 439. Similar emphasis is to be found in *NEWLAND*, 37 Cr.App.R. 154; [1954] 1 Q.B. 158; *ASPINALL* (1876) 2 Q.B.D. 48; and *WHITAKER*, 10 Cr.App.R. 245; [1914] 3 K.B. 1283. There is no clear authority as to the law of conspiracy in relation to agreements to commit fraudulent acts abroad. *KOHN* (1864) 4 F. & F. 68, though unsatisfactory as an authority, supports the appellants' propositions, since the charge of Willes J. to the jury, when properly construed, directs them to convict even if the conspiracy in that case was limited to a scuttling on the high seas (*cf.* *Roscoe's Criminal Evidence*, 16th ed., p. 212): there is nothing in *KOHN* (*supra*) to support the conclusions drawn therefrom by the Court of Criminal Appeal. *WARBURTON* (1870) L.R. 1 C.C.R. 274, where the fraudulent acts (contrary to the view of the Court of Criminal Appeal) were to be effected abroad, also supports the appellants' contentions. Further support is to be found in the dictum of Lord Campbell C.J. in (1858) *TCHORZEWSKI*, 8 St.Tr.(N.S.) 1091, in Sir James Fitzjames Stephen's statements in *Roscoe's Criminal Evidence* (7th ed.), and in his own *History of the Criminal Law*, Vol. II, p. 13: and in Archbold's *Criminal Pleading and Practice*, 33rd ed., p. 1481. *BERNARD* (1858) 8 St.Tr.(N.S.) 887, which is often cited in this connection, is of no assistance since it was a case of incitement, and not of

conspiracy. A conspiracy may be tried in any place where one overt act in pursuance thereof is committed (BRISAC (1803) 4 East 164). A great number of overt acts in London were proved in this case. As to the proposition that a conspiracy is indictable at least if the acts contemplated would be criminal both here and in the country of commission, it is true that Donovan J. at the trial in the Central Criminal Court ruled out evidence of German law. Nevertheless matters of foreign law in a criminal case are to be decided by the judge and not by the jury (HAMMER, 17 Cr.App.R. 142; [1923] 2 K.B. 786). But it may be that this proposition is not open to the appellants in this case, since there was no evidence before the judge of the foreign law applicable.

There are a number of authorities supporting the proposition that a conspiracy to commit a civil wrong is an indictable conspiracy (WHITAKER (*supra*), ASPINALL (*supra*), Warburton (*supra*)). Even if this proposition is not of universal application, it applies to all cases where the acts contemplated are *malum in se*. The precise ambit of the concept of *malum in se* may be difficult to define, but there can be no doubt that the means employed in this case, namely fraud and forgery, were *malum in se*. A tort committed abroad is actionable in this country if it is a tort by English law, and not justifiable (*i.e.*, criminal or tortious) by the law of the country where it is committed (MACHADO v. FONTES [1897] 2 Q.B. 231). The fraud in this case was tortious by English law, and is presumed (even in the absence of evidence) to be tortious by German law *per* Lord Dunedin in DYNAMIT ACTIENGESSELLSCHAFT v. RIO TINTO Co., LTD. [1918] A.C. 260 at pp. 294–295). If there is an agreement to commit a civil wrong, it is indictable as conspiracy irrespective of whether or not the persons whom it is contemplated to wrong in fact suffer damage, provided that the agreement contemplates an act which is likely to cause damage. In any event the Court of Criminal Appeal were wrong in holding that Z.A.K. did not suffer damage in this

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case: as a department of State in Germany they were charged with the duty of dealing with applications for export licences, and pursuant to the fraudulent misrepresentations, they granted licences, which were documents of value.

The appellants' main proposition (*a*) may be stated in an alternative form, namely that an agreement to do an act or employ means which are *malum in se* is indictable as a conspiracy, whether the act or means are to be done or employed within or without the jurisdiction. It would follow that an agreement to do an act or employ means which were merely *malum prohibitum*, and not *malum in se*, would not be indictable where the acts or means were to be effected or employed abroad. (MARTIN AND OTHERS, 40 Cr.App.R. 68; [1956] 2 Q.B. 272.) There are a number of authorities where agreements to do acts *malum in se*, or *contra bonos mores*, have been held indictable although such acts were not substantively either criminal or tortious. The authorities are conveniently collected in Halsbury's *Laws of England*, 3rd ed., Vol. 10, p. 313, note (*e*). The appellants adopt the opinion of the Court of Criminal Appeal as to the significance of section 4 of the Offences against the Person Act, 1861: DEALY *v.* UNITED STATES, (1894) 152 U.S. 539 and HYDE *v.* SHINE, (1905) 199 U.S. 62.

[VISCOUNT SIMONDS: There is a clear distinction between something *malum in se* and a law such as the Sunday Observance Act, 1781.]

[LORD TUCKER: Would an agreement in England to carry out a polygamous marriage in a country where polygamy is lawful be indictable?] Yes, because in this country polygamy is regarded as *malum in se*.

As to the meaning of intent to defraud, the classic definition (*Re* LONDON GLOBE AND FINANCE CORPORATION, LTD. (1903) 1 Ch. 728 at pp. 732-733, *per* Buckley J.) is that "To deceive is to induce a man to believe that a thing is true which is false, and which a person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to

induce a man to act to his injury, thus tersely it may be put, that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action." Z.A.K. were induced by deceit to embark on a course of action, namely to issue the licences. Furthermore they were induced to act to their injury, since although they suffered no pecuniary loss, they were induced to grant a licence which, had they known the true facts, it would have been their right and duty to refuse: (BASSEY (1931) 22 Cr.App.R. 160). Their duty in this respect was a public duty. The mere absence of pecuniary loss does not negative the existence of fraud (NEWLAND (*supra*); BRAILSFORD [1905] 2 K.B. 730).

Neville Faulks following (*David Hurst* with him), for the Crown.

GREGORY v. DUKE OF BRUNSWICK (1843) 1 Car. & Kir. 24; VERTUE v. LORD CLIVE (1769) 4 Burr. 2472, and HOWELL (1864) 4 F. & F. 160 are further examples of cases of conspiracy to do acts not *per se* criminal or tortious, but *malum in se* and *contra bonos mores*.

Neil Lawson, Q.C. and *Sebag Shaw*, for the respondent *Owen*.

The creation of new offences is a matter for the Legislature, not for the courts. This applies *a fortiori* where the alleged offence is created by a statutory instrument. Courts exercising criminal jurisdiction will take special care when vague factors like "public policy" and "public mischief" are concerned. Conspiracy has always been a difficult area in criminal law and the modern tendency is against widening its sphere. It is not in dispute that the respondents agreed together to mislead Z.A.K. into granting export certificates for goods from Western Germany, and it is not now in dispute that the means used for this purpose involved the use of forged end-user certificates which were to be uttered in England. Count 3, however, did not charge any specific acts, only a general conspiracy to defraud. It was not a conspiracy to defraud named

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German manufacturers, and none of these were called as witnesses nor was there any evidence as to their state of mind. Assuming that Z.A.K. were deceived, they were not defrauded, because they merely parted temporarily with certificates to the German manufacturers, and these were not related to any monetary obligation. The trial judge ruled that evidence with regard to German law, which the prosecution sought to lead, was irrelevant. Even if it were relevant, it was wrong for the prosecution to seek to rely on similarity of law in this case. In extradition and bigamy cases the courts do not apply such a presumption, and evidence must be led with regard to foreign law involved: Roscoe's *Criminal Evidence* (16th ed.), p. 405. Even, however, assuming that the presumption can be relied on, the argument breaks down because (a) this would not be an actionable wrong, if a British Government department were misled in a similar way and (b) it is not an offence to tell lies, except where such an offence is specifically created by statute, e.g., in the case of false declarations under Revenue laws or Defence Regulations.

The submission for the respondents is that a mere agreement made in England to perform acts abroad which may not be justifiable there is not at common law an indictable conspiracy in England. This is based on four main contentions. The first is that English criminal jurisdiction is local and does not, in the absence of statutory provision, extend to acts committed or intended to be committed abroad (except piracy *jure gentium*), whether such acts would constitute crimes if committed in England or crimes by foreign law: RAFAEL v. VERELST (1776) 2 Wm.Bl. 1058; PAGE, 37 Cr.App.R. 189; [1954] 1 Q.B. 170; MARTIN AND OTHERS, 40 Cr.App.R. 68; [1956] 2 Q.B. 272. The second is that conspiracy *per se*, the mere agreement, is an inchoate crime, like incitement or attempt, and acquires its criminal character from the object envisaged, whether as means or ends, and if such object does not in itself render the act amenable to English criminal law because it is not in fact or in intention transacted in England, then (subject

to statutory exception, as in the case of conspiracy to murder under section 4 of the Offences against the Person Act, 1861), there is nothing to attach a criminal character to the agreement in the view of English law. Where, however, the object is the commission of an offence which is covered by one of the statutory exceptions, then a conspiracy contemplating such object is indictable. This contention is supported by *BRISAC* (1803) 4 East 164; *KOHN* (1864) 4 F. & F. 68 and *BERNARD* (1858) 8 St.Tr.(N.S.) 887. *WARBURTON* (1870) L.R. 1 C.C.R. 274 and *WHITAKER*, 10 Cr.App.R. 245; [1914] 3 K.B. 1283 can be distinguished, in the first place because the victim of the conspiracy was in England and in the second place because a public servant was involved. [He referred also to Stephen's *History of the Criminal Law*, Vol. 2, pp. 12-14; Wright on *The Law of Criminal Conspiracies and Agreements*, pp. 73-74 and Archbold's *Criminal Pleadings, etc.* 33rd. ed., p. 1481.] The third contention is that there is no principle of public policy which detracts from the inter-related effect of the two earlier contentions, because (a) agreements affected as to validity or enforceability or criminality by considerations of public policy have to be judged from the standpoint of English criminal law or English economic or social institutions; (b) though the principle of the comity of nations is part of English law so that the courts pay respect to foreign laws, this respect is indicated (i) in generally declining jurisdiction in relation to foreign crimes; (ii) in applying the doctrine of non-enforceability to civil claims in certain cases. The courts here stop short of enforcement in a positive sense of any foreign law. The fourth contention is that, where the object of an agreement is the performance of acts which are not within the scope of English criminal law, the fact that its object is the violation of the rights of a third party and that such party may be given a right of action does not make the agreement an indictable conspiracy in the absence of (a) disturbance of the peace or (b) injury to the public, the "public" being either the public at large or large

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classes of the public. Thus an agreement to commit a trespass to land would not be indictable unless element (a) were present. The position is, of course, otherwise, where the object is within the scope of the criminal law. *MULCAHY* (1868) L.R. 3 H.L. 306; *MOGUL STEAMSHIP CO., LTD. v. MCGREGOR GOW, LTD.* [1892] A.C. 24 at pp. 39, 46, 51, 58.

The Crown's submission, broadly, is that an agreement to do an unlawful act or a lawful act by unlawful means is indictable in England, notwithstanding that such unlawful matter is to be transacted abroad. There are initial fallacies in this submission (a) in that "unlawful" is given too broad a meaning and (b) the basic principle is that the legality of acts has to be determined by reference to the law of the place of their performance, at least when deciding whether or not they give an agreement a criminal character. Dealing with the propositions in more detail, the first appeared to be that the agreement was indictable in England because it was for the commission of an act of fraud or dishonesty. This proposition, however, is too widely stated, because an agreement to tell lies is not indictable. An agreement to commit fraud, whether as means or ends, is an indictable conspiracy only if (i) it would be indictable as a common law fraud or cheat or as a statutory offence such as false pretences or forgery, in which the *locus* of the act is the vital element; or (ii) the object is injury to the English public or sections thereof, in which case also *locus* is vital: *ASPINALL* (1876) 2 Q.B.D. 48 or (iii) injury to a person here in his proprietary rights is contemplated. It may be that *WARBURTON* (*supra*) is distinguishable from the present case on this basis only, though more probably it should be treated as falling under the first head. There is no case which supports the Crown's general proposition, even assuming that what was contemplated here was a fraud abroad. The Crown's next proposition was that the agreement was indictable in England because it was an agreement to commit a civil wrong. Accepting the basis of *MACHADO v. FONTES* [1897] 2 Q.B. 231, it cannot be assumed

that the object was "unjustifiable" by German law; but even if it could be so assumed, the proposition will not hold, first, because it ignores the different basis of criminal jurisdiction, which rests on the *locus* and the wrong, and civil jurisdiction, which rests on personal amenability to jurisdiction, *locus* being generally immaterial; secondly, because it wrongly assumes that Z.A.K. could have instituted civil process; thirdly, because a suit by Z.A.K. would have involved the English courts in enforcing at the suit of a foreign State a foreign revenue or fiscal law, which is against all authority and principle. The Crown's last proposition was that the agreement was indictable in England as being contrary to public policy in that it was (a) against the comity of nations; and that it (b) constituted a public mischief; but the comity of nations does not extend to enforcement of the criminal law: FOSTER v. DRISCOLL [1929] 2 K.B. 476, at pp. 495, 510, 515, 519 and public mischief should be restricted in scope on fundamental basis to public interest in England: BRAILSFORD (*supra*). *Malum in se* depends on the character of the locality in the way of its social institutions. In some non-European countries, killing a human being is not always regarded as *malum in se*. [VISCOUNT SIMONDS: The division of actions into *malum in se* and *malum prohibitum* answers something in the deep-seated consciousness of mankind.] [LORD SOMERVELL: With the increase of statutory offences the distinction is now greater than it was formerly.] There are many States now recognised internationally where the standards are quite different from those which obtain in England. [LORD SOMERVELL: The distinction may be useful, although applied differently in different countries.]

Alexander Karmel, Q.C. and I. Baillieu, for the respondent Seth-Smith.

The argument of this respondent is based on three propositions. The first is that, whereas the crime of conspiracy lies in the making of an agreement, it is only the nature and quality of the agreement which renders it a conspiracy. The

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second is that illegality of the agreement in the present case must depend on English law, since the offence alleged was against English law, and it is not the policy of English law to enforce foreign law. The fact that an agreement, if performed, might involve a breach of foreign law is no ground for holding it to be an indictable conspiracy in England. The third is that there is no precedent for the proposition that an agreement to do something outside the territorial jurisdiction of the English courts which would be criminal only if done within that jurisdiction may be the subject of an indictment. It has been said that when in Rome one must do as the Romans do. The argument for the Crown would not even allow the Romans in Rome to do as the Romans do. Many acts are criminal in England which are not criminal abroad, *e.g.*, homosexuality, gaming and cockfighting. If the argument for the Crown is right, if two Frenchmen resident in England agreed to go to Paris to commit an act of homosexuality in Paris they would be guilty of an indictable conspiracy. If an agreement to do an act which has the qualities of a crime if it were done in England is nevertheless not indictable as a conspiracy in England on the principles submitted, it follows *a fortiori* that an agreement to commit a tort abroad cannot be indictable. When it is said that an agreement to commit an unlawful act amounts to conspiracy, that must mean an act unlawful by English law, and similarly when it is said that an agreement to commit a public mischief amounts to a conspiracy, the mischief must be one affecting the public, or a substantial portion of the public, in England. Further, the argument for the Crown would violate the comity of nations, since all nations zealously guard the right to try crimes committed in their own territory, and expression is given to the comity of nations by the laws of extradition and is so limited. The principal authority relied on is BERNARD (*supra*) where there was no attempt to prosecute the prisoner for a common law conspiracy, and the Commission set up to try him under statute had to prove that he was a British subject within the meaning of the

statute. That case was followed by section 4 of the Offences against the Person Act, 1861, which made conspiracy to murder a statutory misdemeanour. The statute did not, however, expound the common law or create a statutory offence with regard to conspiracies to wound. In *KOHN* (*supra*) the problem raised by the present case is recognised, but left open. In 1870 Stephen in his *History of the Criminal Law* expounded the problem and said that it was one which should be tackled by legislation. If that were true then, how much more is it true nearly a century later. If legislation were introduced, there would have to be a mass of exceptions, because so many crimes are trivial, while with regard to others there is disagreement between nations as to their criminality. Crimes committed for a political motive, too, would probably have to be excepted.

On the second limb of the case, namely, whether there was any conspiracy to defraud, one has to ascertain what the jury actually found. Donovan J.'s direction to the effect that the using of deceit amounts to intent to defraud must be too wide. The Forgery Act, 1913, draws a distinction between intent to deceive and intent to defraud, and the very definition of forged document presupposes a course of conduct amounting only to deceit. Again section 3 specifies certain documents, including documents relating to marriage, where an intent to deceive is sufficient to constitute the offence; but a misrepresentation to the officiating clergyman with regard to the age of one of the parties to a wedding would be deceit and not defrauding. The distinction is clearly drawn by Buckley J. in *Re LONDON AND GLOBE FINANCE CORPORATION* [1903] 1 Ch. 728, at p. 732 and this distinction was disregarded by Donovan J. In *BRAILS福德* (*supra*) there was a charge of obtaining a passport by false pretences and also of conspiracy to effect a public mischief. The jury were discharged from giving a verdict on the first charge. On the second charge there was a long argument in the Court for Crown Cases Reserved, and it was held that the fact that public authorities

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had been deceived, as opposed to defrauded, amounted to public mischief. In *BASSEY (supra)*, on which the Crown strongly relied, the real *ratio decidendi* of the case was that the Inn of Court was deprived of money which otherwise it would have obtained. It is conceded that the judgment in terms went beyond that, but it is submitted that, in so far as it did, it was wrong. That is the view taken in Kenny's *Criminal Law*, 16th ed., p. 301.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) in reply.

The crux of the appellants' case is that the agreement in this case was an agreement to defraud. The agreement in England was proved; overt acts in England in pursuance of the agreement were proved; an intent to defraud was proved. This intent renders the agreement indictable, irrespective of the fact that it was contemplated that the fraud should be perpetrated abroad on a person outside the jurisdiction. *WHITCHURCH* (1890) 24 Q.B.D. 420; *HUDSON* (1860) Bell 263. *WARBURTON (supra)* was approved in *QUINN v. LEATHAM* [1901] A.C. 495, *per* Lord Brampton at p. 529, and was referred to in *ASPINALL (supra)*, *WHITAKER (supra)*, and *POTTER* [1953] 1 All E.R. 296.

It is important to remember that conspiracy to defraud is a common law offence and not one created by statute, and a common law offence remains an offence wherever it is committed. The reason why a common law offence committed abroad is not triable in England is not because it ceases to be an offence, but for want of jurisdiction. Offences such as murder, theft and fraud are *mala in se* and are, accordingly, offences wherever they are committed. A conspiracy to commit an act of homosexuality abroad would be regarded as *malum in se* and accordingly indictable in England. Conspiracies to infringe the Lord's Day Observance Act abroad or to form a casino in France would not be indictable in England, because they would not be *mala in se*. It may be difficult to say precisely where the line should be drawn

between an act which is *malum in se* and an act which is not, but fraud clearly comes within the category of *malum in se*.

The House took time for consideration.

Jan. 29, 1957. The following opinions were delivered :

VISCOUNT SIMONDS: My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Tucker, and, fully agreeing as I do with his reasoning and conclusions, I shall satisfy myself by moving that this appeal be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, I too have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Tucker, and I agree that the appeal should be dismissed for the reasons which he gives.

LORD TUCKER: My Lords, the respondents to this appeal, which is brought pursuant to the fiat of the Attorney-General, were convicted at the Central Criminal Court on May 17, 1956, after a trial before Donovan J. and a jury, on two counts of an indictment charging them with conspiracy; the respondent Owen was also convicted on a further count which charged him with uttering a forged document. They appealed to the Court of Criminal Appeal, who quashed the conviction on the first of the conspiracy counts and dismissed the appeals in respect of the other counts.

The counts referred to above were numbered 3, 5 and 6 in the indictment, and it is in respect of the order of the Court of Criminal Appeal quashing the conviction on count 3 that this appeal is brought by the Crown. It is unnecessary to refer to counts 1, 2 and 4, two of which were quashed and on the third no verdict given. Counts 3 and 5 must be set out in full. Count 3, as amended at the trial, reads as follows:—
“ Statement of Offence: Conspiracy to defraud. Particulars of Offence: Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith between the 1st day of December, 1951, and the 1st day

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of December, 1953, in the City of London and elsewhere conspired together and with Austay London, Ltd., and Alfred Robert Cummings and with other persons unknown to defraud Gruppe Zentrale Ausfuhrkontrolle of the Bundesstelle für den Warenverkehr der gewerblichen Wirtschaft of the Federal Republic of Germany (known as and hereinafter referred to as Z.A.K.), that is, to cause Z.A.K. to grant licences to export certain metals from the Republic of Germany by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R." Count 5: "*Statement of Offence*: Conspiracy to utter forged documents. *Particulars of Offence*: Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith and Leslie Eric Hamson between the 1st day of December, 1951, and the 1st day of December, 1953, in the City of London and elsewhere conspired together and with Austay London, Ltd., and with other persons unknown to utter forged documents purporting to be end-user certificates made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland on behalf of the Minister of the said Department certifying that certain metals to be imported into the said Republic would not be re-exported therefrom, knowing the same to be forged and with intent to defraud."

The general nature of the respondents' operations as disclosed by the evidence is to be found conveniently summarised in the judgment of the Court of Criminal Appeal as follows:—"The conspiracy and the method adopted to effect it can be quite shortly stated. The German Government would not grant licences for the export of strategic materials to Eastern European countries. The appellants were directors of a company called Austay London, Ltd., and Seth-Smith was chairman of an Irish company called Smith Miller (Eire), Ltd. Austay, Ltd., bought metal in Germany and the appellants put false documents before Z.A.K., the licensing authority of the German Government, purporting to show that the metal

would be exported only to Ireland, whereas in fact it was to be exported to 'Iron Curtain' countries. They also obtained through Smith Miller (Eire), Ltd. and presented to Z.A.K. documents which are known as end-user certificates which purported to be given by a government department of Eire certifying that the metal would not be exported from, but would be used in Ireland. These documents, six of which were proved in evidence, were bought for a substantial sum of money from a person named Higgins, who apparently carried on a business in Dublin of supplying forged certificates."

My Lords, it may be convenient at this stage, before passing to the principal question raised in this appeal, to make some observations with regard to these two counts and the nature of criminal conspiracy in English law. The Court of Criminal Appeal (the Lord Chief Justice, and Ormerod and Ashworth JJ.) in their judgment delivered by Lord Goddard observed: "It is not altogether easy to appreciate what offence it was intended to allege in the first of these counts, which was called throughout the case 'count 3,' as distinct from that alleged in the other, called 'count 5.' The evidence would seem to be identical on both counts. Presumably count 3 was intended to refer to the fraudulent representations as to the destination of the goods and to the false shipping documents used in support, while count 5 is confined to the forged end-user certificates subsequently produced in support of the earlier representations. With regard to count 3 the court has felt considerable doubt as to whether it was right to charge an intent to defraud and not an intent to deceive." They expressed no concluded opinion on this point in view of their decision on the main question upon which the trial judge had granted his certificate of appeal, *viz.*, as to whether a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country. A good deal of argument was directed to your Lordships on the hearing of the appeal with regard to the words "with intent to defraud." It is, however, to be observed that in count 3, with which

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alone your Lordships are concerned, the words "with intent" do not appear whereas, by contrast, in count 5 they do appear. Whether or not the matters alleged in count 3 and the evidence adduced in support thereof are correctly described as a conspiracy to defraud, I have no doubt that they disclose a conspiracy which would be indictable here if the acts designed to be done and the object to be achieved were in this country. It is a conspiracy by unlawful means, *viz.*, by making representations known to be false to procure from a department of government an export licence which but for such representations could not have been lawfully obtained. It is an example of a conspiracy by unlawful means to achieve an object in itself lawful, *i.e.*, the issue of an export licence. If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud, and if it is necessary to aver and prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with the duty to prevent. Although the count does not expressly state the locality where the fraudulent representations were to be made or the licence was to be obtained, the evidence showed not only that the representations were in fact made in Germany and the licence was issued there, but that the circumstances were such that the conspiracy must have been one in which the representations were designed to be made in Germany and the licence obtained there. It is accordingly to be distinguished from count 5, where the crime designed to be committed was the uttering of a forged document in this country with intent to defraud, it being immaterial whether the person or persons to be defrauded were in Germany or elsewhere. Such a count is admittedly triable here.

My Lords, I will accordingly deal with count 3 on the basis that, if the evidence adduced in support of it had established a conspiracy here to make false representations in this country

and thereby obtain in this country a licence of this nature, it would have constituted a criminal conspiracy. The question then remains whether the fact that the evidence disclosed a conspiracy here to make false representations in Germany and obtain a licence there renders the conspiracy one which cannot be made the subject of a criminal prosecution, and if the answer is that it is not indictable here, is that because it was not a conspiracy to commit a crime, or are all conspiracies to do acts abroad, whether criminal or only unlawful, outside the purview of the criminal courts of this country?

If such conspiracies are punishable in the criminal courts of England, it is, in any case, remarkable that in the long history of the English criminal law no case has been found in which anyone has ever been convicted of such an offence. I shall refer later to *WARBURTON* (1870) L.R. 1 C.C.R. 274 and explain why I do not consider that this case is an exception to this general statement. The matter has, however, been the subject of discussion for many years, and different views have from time to time been expressed by judges and writers of legal textbooks. Before passing to such authorities as there are, it may be helpful to refer to some observations of Mr. Justice R. S. Wright in his *Law of Criminal Conspiracies and Agreements* published in 1873. At page 80 he prefaces his conclusions by posing the question: "What is the proper place or use in the criminal law of the mere mental act or state of agreement or concurrence; an act or state which in itself is plainly neutral and conveys no associated idea of praise or blame?" In attempting to answer the question he says the first step is to distinguish between (1) agreements for the commission of crimes; (2) agreements for minor offences; and (3) agreements for acts which in the absence of agreement would not be crimes or offences. He treats the first class as being merely auxiliary to the law which creates the crime. As to agreements for minor offences, he says (at page 83): "It is next to be considered in what manner agreements ought to

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be treated when they are for offences punishable only on summary prosecution and by minor penalties. There is great difficulty in discovering the principles which are here applicable; but the difficulty will be diminished by dismissing at the outset all offences which ought in a good penal system to be treated as crimes, but which happen to be treated only as minor offences in any particular penal system. These being eliminated, the remaining offences consist in the production of results which, *ex hypothesi*, are not in themselves of grave enough consequence to be matters for indictment; and, if so, it must in general be immaterial whether the results are produced by one person or by two or more persons. To permit two persons to be indicted for a conspiracy to make a slide in the street of a town, or to catch hedge-sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve." In dealing with the third class, *i.e.*, agreements for acts which in the absence of agreement would not be crimes or offences, after referring to two peculiar classes, *i.e.*, (a) acts which are necessarily collective and cannot for physical reasons be committed by one person; and (b) certain frauds or perversions of justice which are not, but ought to be, punishable irrespective of agreement, he proceeds: "Apart from cases falling within one or other of these two classes, there appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement; for if the act is one which can be done by a person acting alone, and when so done ought not to be punished, it is difficult to see at what point and on what ground criminality can be generally introduced by the fact that two or more persons concur in the act." And in the last paragraph of the book, in summarising his conclusions he says, with reference to this last class of agreement: "In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which

are not, but which ought to be, made punishable irrespectively of agreement, and especially for some kinds of fraud; but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such power ought to be carefully guarded, since the legislature admits its own inability to discover the principles on which legislation ought to proceed."

My Lords, I have thought it right to cite these passages to show how ill-defined and uncertain were the limits of this crime in 1873, and I may add that neither subsequent judicial decision nor legislation has helped to set limits or afford more certainty. It is the law on this subject which your Lordships are now asked to expound in relation to agreements to commit crimes or other unlawful acts out of the jurisdiction in a country where criminal conspiracy is, according to the evidence given at the trial, unknown to its own law. The gist of the offence being the agreement whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognise the offence to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned. Furthermore, historically it appears to be closely allied in its development to the law with regard to attempts. Sir William Holdsworth, in volume V of his *History of English Law* at p. 203, dealing with conspiracy, writes as follows:—"Stephen remarks that 'conspiracy has much analogy to an attempt to commit a crime.' And we shall see that this analogy at this period comes out clearly enough in the manner in which it was treated by the Court of Star Chamber. But we have seen that, historically, conspiracy is more closely connected with offences against the administration of justice; and that it was almost exclusively from this point of view that it was treated by the medieval common law. The modern law on this subject really springs from these two diverse yet connected roots." After referring to the manner

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in which the Star Chamber punished conspiracies as well as false and malicious accusations made before itself or the Court of Chancery, he continues, at p. 204, as follows:—"But it is clear that under these circumstances the element of conspiracy will tend to evaporate. The gist of the offence will be rather the malicious attempt to ruin another by a false charge than the conspiracy to effect this result. It was inevitable, therefore, as Stephen has said, that conspiracy should come to be regarded as a form of attempt to commit a wrong. It was so regarded in the sentence given in the Star Chamber against those who attempted to fight duels; and in the *Poulterer's Case* (1610) 9 Co.Rep. 55b it was ruled in the Star Chamber that the mere conspiracy, though nothing was executed, was an offence. But, if a conspiracy is so regarded, why restrict it to conspiracies to commit some offence in relation to legal proceedings? The Star Chamber acted upon this view; and just as it punished all kinds of attempts to commit wrongful acts, so, *a fortiori*, it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts. When the Star Chamber was abolished, the two divergent streams of doctrine which resulted from the medieval precedents and the rules evolved in the Star Chamber, produced some very complex developments in the law of crime and tort." As a footnote to the above he quotes the following passage from Coke:—"The usual commission of *oyer and terminer* gives power to the commissioners to enquire etc., *de omnibus coadunationibus, confederationibus, et falsis alligantiis* . . . in these cases, before the unlawful act executed, the law punishes the coadunation, confederacy or false alliance, *to the end to prevent the unlawful act*" (my italics). ". . . And in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it." 9 Co.Rep. at f. 56b. Accepting the above as the historical basis of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it

has even reached the stage of an attempt and that it is all part and parcel of the preservation of the Queen's peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement.

Returning to the present case, the trial judge, in his summing-up, directed the jury as follows:—"You have in particular to accept it from me, and this is what the argument was all about during one of the occasions when you were out, that if two people conspire in this country to do something unlawful by the law of this country, for example commit a fraud, or utter forged documents, then it is an offence even if they agree to commit their fraud or their uttering of forged documents abroad." After verdict and sentence and in granting a certificate of appeal, Donovan J. explained in detail his reasons for giving this direction. He said: "I regard it as unlawful in English law to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country—which I think Z.A.K. could have done, and could still do in the present case." I think, however, his decision was really based on broader grounds, as shown by the passage which immediately follows:—"Then remembering that it is the agreeing which constitutes the crime, whether the unlawful object is effected or not, I cannot on principle see how the conspiracy constituted by such an agreement becomes untriable here, simply because the crime or tort has been committed abroad. Logic does not compel such a conclusion. Considerations of the public weal do not compel it either. It would be of no benefit to this country if it became the sanctuary for conspirators, provided only that they concluded their unlawful plots abroad. Anomalies there may be, of course, but they exist whatever the true conclusion." In the above passage I have no doubt that the learned judge in using the words "simply because the crime or tort has been committed abroad" meant "simply because the crime or tort is to be committed abroad."

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These observations have great force and it was on this foundation that the Attorney-General based his case before your Lordships. The Court of Criminal Appeal, after considering the authorities and pointing out that by statute certain acts are crimes punishable in England wherever committed, *e.g.*, murder, bigamy, offences against the Foreign Enlistment Act, the Official Secrets Act and the Merchant Shipping Act, proceeded:—"In our opinion the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here, because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For instance, if two persons agreed here to stage a sham burglary abroad in order to collect insurances from English underwriters, the conspiracy would be indictable here though the overt act was to be done abroad, because if the plot were carried out the obtaining or attempting to obtain the insurance money would be clearly indictable. In the present case the plot, though formed here, was carried out in Germany and assuming, as we have, that Z.A.K. were defrauded and not only deceived, the persons defrauded were Germans in Germany. In our opinion no offence was committed in Germany for which the appellants could have been indicted in England and consequently in our opinion the conspiracy is not indictable." Referring to section 4 of the Offences against the Person Act, 1861, which makes a conspiracy in this country to murder any person abroad whether within the Queen's domains or not and whether the person is or is not a subject of the Queen a misdemeanour punishable with a maximum of ten years' imprisonment, the court observed that, as at any rate since 33 Hen. 8, c. 23, a British subject had been indictable in this country for murder committed abroad and the Offences against the Person Act of

1828 expressly provided for the trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without, it followed that being an accessory to murder abroad or conspiracy to murder abroad was triable here. They were accordingly of opinion that section 4 of the Act of 1861 did not alter the common law but provided a special penalty and made it clear that such a conspiracy by anyone in this country was indictable. This reasoning was not contested before your Lordships by either side and is clearly right. In this connection it should perhaps be noted that further statutory recognition of conspiracies to commit crimes is to be found in the Quarter Sessions Act, 1842, the Criminal Justice Act, 1925, and the Administration of Justice (Miscellaneous Provisions) Act, 1938, whereby Courts of Quarter Sessions have jurisdiction to try (1) conspiracies to commit any offence which such court can try when committed by one person; (2) conspiracies to cheat and defraud; and (3) conspiracies to commit offences punishable on summary conviction.

My Lords, I turn now to refer to some of the authorities, but, as none of them are decisive and as there is no dispute as to the essential elements of the crime if everything is to take place within the jurisdiction, I have not been able to derive a great deal of assistance therefrom. In *BERNARD* (1858) 8 St.Tr.(N.S.) 887 the defendant, an alien, was indicted as an accessory before the fact to the murder in Paris of one Nicolas Batty who had been killed in the Orsini plot to assassinate the Emperor Napoleon III. He was charged under 9 Geo. 4, c. 31, s. 7, which provided that "if any of His Majesty's subjects shall be charged in this country with any murder . . . or with being accessory before the fact to any murder . . . the same being committed on land out of the United Kingdom, whether within the King's dominions or without" he might be tried here under a Special Commission. Lord Campbell in his charge to the grand jury told them that the accused, although an alien residing here, was as much amenable to this

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provision as a native-born subject. He was acquitted and an indictment against him for conspiracy which had been found against him at the Central Criminal Court and removed into the Queen's Bench was not proceeded with. In the same year there is to be found at page 1091 of the same volume of *State Trials* reference to the case of TCHORZEWSKI in which the defendant was indicted for publishing in French a seditious libel justifying the attempt to murder the Emperor. The defendant having expressed his regret, the Crown was willing to accept a verdict of "Not Guilty," but Lord Campbell, L.C.J. made the following observation at the conclusion of the proceedings: "But those who find an asylum here must ever bear in mind that while they have the protection of the law of England they are bound to obey that law, and that they are equally liable with the subjects of Her Majesty for any crime which may be committed by them while they are resident within the realm. I hope they will bear this in mind and will understand that it is a crime on the part of a British subject, or for a foreigner owing temporary allegiance to the Crown of England, to plot and conspire for the commission of a crime in a foreign country, or for the commission of a crime in this country." There had, of course, been no argument on the matter and the defendant had not been charged with conspiracy. KOHN (1864) 4 F. & F. 68 is undoubtedly the most relevant case, though it is by no means easy to determine from the report what was or was not decided expressly or by inference by Willes J. The prisoner was indicted for conspiring at Ramsgate with the owner and master and mate of a ship named the *Alma* to cast away or destroy the vessel with intent to prejudice Belgian underwriters. The prisoner was a foreigner and the ship a Prussian merchant vessel. She was loaded at Ramsgate. Six days from the date of sailing she was scuttled and sunk far from the English coast and out of the jurisdiction of the court sitting at Maidstone Assizes. Evidence of the conspiracy to which the accused was alleged to have been a party consisted of a number of statements made

by him to the mate of the British vessel *Helena* by which the crew of the *Alma* had been rescued, and to a clerk of the Salvage Association of Lloyds and other persons after his arrest. He said that on the captain's orders he had cut a piece out of the side of the ship at Ramsgate and bored holes in her and then plugged the holes; later, when the *Helena* was hailed, he removed the plugs. He spoke to a conversation with the mate in which the latter had stated the vessel would never reach her destination and had spoken of making away with her. The prisoner had then remarked: "Then you may as well sink her at once on the bar." To this the mate had replied that it would be too close to land. It is clear that there was no express agreement one way or the other as to whether the vessel was to be scuttled within or without territorial waters, but she was in fact destroyed outside. On this evidence Willes J. directed the jury as follows: "The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in *BERNARD (supra)*, as to a conspiracy limited to a criminal offence to be committed *abroad*. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be *within* the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the *conspiracy* was in this country, although the overt acts were abroad. The parties who concocted the conspiracy, it is obvious, could only have an object to prejudice or injure some other persons. For the principal offence committed, the destroying or casting away the vessel, the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign, and the offence was committed on the high seas. The question then is, was it agreed and consented

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to by and between the prisoner and any other person at Rams-gate, that the ship should be destroyed, whether at sea or in port? The prisoner's confession places it beyond doubt that he was a party to the act of scuttling the ship; but was he a party to a previous *conspiracy* to that end?"

The jury returned a verdict of "Not Guilty." I think it is clear that Willes J. took the view that on the evidence it was not possible for the jury to find that the conspiracy was limited to scuttling on the high seas. He says in terms: "Here it was not so limited." Accordingly it was not necessary for him to direct them as to the law applicable to a conspiracy so limited. On the other hand, if he had thought that a conspiracy limited to scuttling in territorial waters would alone have been indictable, he, no doubt, would have directed the jury to acquit. He left it to the jury to decide whether the prisoner was party to a conspiracy which on the evidence was one which left open where the scuttling was to take place. This he regarded as a criminal conspiracy because it was not limited to the high seas. The case is, in my opinion, therefore inconclusive as to the law with regard to conspiracies so limited.

The Court of Criminal Appeal interpreted this case as authority for the following four propositions:—(1) That an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (2) that to conspire to scuttle out of the jurisdiction is not indictable; (3) to conspire to scuttle whether the ship should be within or without the jurisdiction is indictable, as the ship might be scuttled in an English port or within English territorial waters; (4) that to conspire to injure persons within by doing an act out of the jurisdiction is indictable. I agree as to (1) and (3) but I do not think it is an authority for (2) and (4). Stephen J. in referring to this case in the seventh edition of Roscoe's *Criminal Evidence* at p. 244 expressed a view similar to that which I have indicated above as to what was actually decided, but added "but on principle it ought to be criminal." In his *History of the Criminal Law*

of *England*, Vol. 2 at pp. 13 and 14, dealing with the question of conspiracies in England to commit crimes abroad (other than murder), he regards the law as unsettled and expresses the view that it is the duty of the legislature to remove all doubt by putting such conspiracies, subject to certain possible exceptions, on the same footing as crimes committed in England. BRISAC (1803) 4 East 163 was a case of conspiracy in a British ship on the high seas and turned on the question of the venue necessary to found the jurisdiction for trial at Westminster, it having been contended that the offence was only triable under the Admiralty Commission. It is accordingly of no assistance in this case. In WARBURTON (*supra*) the defendant was indicted for conspiring with Joseph Warburton and W. H. Pepys to cheat and defraud his partner Lister. The partnership was English, but part of the business was carried on at Urbigau in Saxony. The defendant had given notice for dissolution of the partnership between himself and Lister, which would necessitate the taking of an account of the partnership property and its division, after payment of liabilities, between the partners. The conspiracy was by false documents and false entries in the books in Saxony to make it appear that Pepys was a creditor of the firm so that certain partnership property was to be withdrawn and handed to Pepys or otherwise abstracted and kept back for division between the defendant Pepys and Joseph Warburton to the exclusion of Lister. Although the fraudulent acts were to be performed abroad, the ultimate taking of the account and division of the partnership property would take place in England. No objection was raised on the ground that the fraudulent acts were to be performed abroad. The only point taken was that the fraud at that date was one which, apart from conspiracy, was neither actionable nor criminal, and therefore the conspiracy could not be criminal. It was held that the acts agreed to be done constituted a civil wrong and therefore the conspiracy was criminal. As the final act necessary to effect the fraud was to be carried out in this country

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on a person here, this also is a case from which I am unable to derive much assistance.

One further case must be mentioned, *viz.* WHITCHURCH (1890) 24 Q.B.D. 420. In this case three persons, one of whom was Elizabeth Cross, were charged with conspiring to procure the abortion of the said Elizabeth Cross. The offence of administering to herself any poison or other noxious thing or unlawfully using any instrument or other means with intent to procure her abortion requires that the woman should be with child. Elizabeth Cross was in fact not pregnant. In the case, however, of persons other than the woman herself the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 58 enacts: "and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer . . . shall be guilty of felony." All the accused were convicted. In the case of Elizabeth Cross, Wills J., the trial judge, stated a case for the Court of Crown Cases Reserved. In it he stated his opinion that, although it was not criminal for a woman not pregnant to do such acts to herself intending thereby to procure abortion which was actually impossible, it was none the less criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant) because the commission of the felony was rendered impossible by circumstances unknown to her. But he went on to state his further opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone and without the help of the men, might not have been criminal. He had accordingly directed the jury, if they believed the evidence, to convict the prisoners. The conviction was upheld, but none of the judgments indicate whether this was on the basis of the first part of Wills J.'s opinion or on the second. If either was correct, the conviction had to stand. It is true that no distinction is drawn between

the two alternative bases for the judge's opinion, but I do not think this case affords a very firm ground for drawing any fundamental conclusions with regard to the law of criminal conspiracy.

The Attorney-General based his case principally on the contention that, the essence of the crime being the agreement, it is immaterial where it is intended to be carried out or on whom the crime or fraud is to be perpetrated. It is, he said, unnecessary to allege in the count the locality of the scene of the designed operations, while it is necessary to state the locality of the agreement to give jurisdiction to the court of trial. But, alternatively, while saying he was not concerned to show in what particular category of conspiracy the present case came, he submitted that, being a conspiracy to defraud, it came within the class of conspiracies to do acts which are *mala in se* and as such clearly criminal in their nature irrespective of locality. He contended that acts which were criminal at common law, such as murder and theft, although subsequently made statutory offences, were to be regarded as crimes, even if for procedural or other reasons they were not punishable here. And in this category he sought to include "frauds." By way of illustration he cited certain passages from the judgment of Devlin J. in the recent case of MARTIN, 40 Cr.App.R. 68, at p. 79; [1956] 2 Q.B. at pp. 272, 285-286. My Lords, this argument is an attractive one and it accords to some extent with the views expressed by Mr. Justice Wright in the passages already cited from his *Law of Criminal Conspiracies and Agreements*, where he refers more than once to acts which "ought to be" regarded as "crimes," although they may not in fact be punishable, and suggests this as the test for determining whether a particular conspiracy should be regarded as criminal. But it is significant that he also considered the task of classifying the acts which would determine the criminality of conspiracy was one for the legislature. Ideas as to what acts are *mala in se* vary widely in different periods of time and in different parts of the civilised world. This classification is

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none the less one which may still be of assistance in certain spheres of law, but the criminal law requires the maximum degree of definition and so uncertain a test as this seems to me ill-suited for the determination of the limits of criminality in the field of conspiracy. Moreover, I think the following passage in Halsbury's *Laws of England* (3rd ed., Vol. 10, p. 271):—"A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment," correctly defines the nature of a crime in the criminal law.

My Lords, I share the views of R. S. Wright and Stephen J.J. that the task of determining what conspiracies, if any, in this already indeterminate field are to be triable and punishable in this country when the acts planned would not themselves have been indictable here if carried out abroad is not one which is suitable for your Lordships sitting in your judicial capacity. In this connection I would make further reference to Sir William Holdsworth. At p. 277 of Vol. III he wrote—"Moreover, at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an Act of the legislature." No one has ever been convicted of such a conspiracy, and if it is in the public interest that such conspiracies should be triable and punishable here, it is, I think, for the legislature so to determine. The comity of nations can hardly require the acceptance of the Crown's contentions in the present case, having regard to the non-recognition of conspiracy as a crime in Germany. Moreover, in the field of criminal law the comity of nations can best be served by treaties of extradition.

I have reached the conclusion that the decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here is correct and from what I have already said it necessarily follows that a

conspiracy of the nature of that charged in count 3 as proved in evidence—which in my view was a conspiracy to attain a lawful object by unlawful means rather than to commit a crime—is not triable in this country, since the unlawful means and the ultimate object were both outside the jurisdiction. In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad.

My Lords, for these reasons I would dismiss this appeal.

My Lords, my noble and learned friend, Lord Radcliffe, who is unable to be present today, has asked me to say that he concurs in the opinion that I have just delivered.

LORD SOMERVELL OF HARROW: My Lords, I agree that the appeal should be dismissed for the reasons given by my noble and learned friend, Lord Tucker.

Appeal dismissed.

Solicitors: The Solicitor, Board of Trade, for the Crown; Stikeman & Co., for the first appellant; Malcolm McDougal, for the second appellant.

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[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE LYNSKEY

ARMSTRONG v. CLARK

1957
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Road Traffic—Driving when Under Influence of Drug—insulin a Drug—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 15 (1), as amended by Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67), s. 55 and Sched. IX.

For the purposes of section 15 (1) of the Road Traffic Act, 1930, which (as amended) prohibits any person from driving or attempting to drive a motor vehicle on a road or other public place when he is under the influence of drink or drug to such an extent as to be incapable of having proper control of the vehicle, “drug” means any substance taken as a medicine, for the purpose of curing, alleviating or assisting an ailing body, and includes insulin.

Semble, that “drink” refers to alcoholic drink only.

Case stated by Cheshire justices.

At Prestbury Magistrates’ Court three informations were preferred by the appellant, William Armstrong, a police officer, against the respondent. The first charged him with driving a motor-car on a road when under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle, contrary to section 15 (1) of the Road Traffic Act, 1930. The second charged him with driving without due care and attention, contrary to section 12 of the Act, and the third with driving without reasonable consideration for other persons using the road, also contrary to section 12.

According to the facts found by the justices, the respondent

was a pharmaceutical chemist and had suffered from diabetes for the past twelve years. On Aug. 13, 1956, he had taken by injection his usual and prescribed quantity of insulin and had then consumed a meal. He had then driven to the Rex Cinema, Wilmslow, a distance of about two miles. After leaving the cinema, he remembered no more than that he walked or was walking down the steps at the entrance of the cinema. He did in fact get into his motor-car, which he then drove from Wilmslow to Alderley Edge and then along a road known as Macclesfield Road, Over Alderley. At a point approximately four miles from the cinema his car left the roadway, and went through the near-side hedge into an adjoining field, travelling a distance of some two hundred yards until it stopped in gear. The respondent was found by the landowner about 10.15 p.m. the same day sitting rigidly at the wheel, but in a semi-comatose state. He had not sustained any apparent injury, and at the time of a medical examination after he had been taken to hospital, was in a hypoglycaemic coma due to the over-action of the insulin injection he had taken earlier.

The justices dismissed all the informations and the prosecutor appealed.

R. J. Parker and F. P. Neill, for the appellant.

Gerald Howard, Q.C., and J. W. Da Cunha, for the respondent.

THE LORD CHIEF JUSTICE: In spite of Mr. Howard's argument which, as we should expect, he has put in the most attractive form, in my opinion this is a very clear case.

The respondent was charged before the justices, first of all, with driving a motor vehicle on a road when under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle, contrary to section 15 (1) of the Road Traffic Act, 1930. Unfortunately the respondent is a diabetic. We know that modern science has found, not only the cause of diabetes, but also a remedy, which, I

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believe, enables a diabetic to continue his ordinary avocations. It supplies the deficiency which causes the condition so that with the assistance of insulin he can live an ordinary normal life. The respondent, who himself is a pharmaceutical chemist, and so ought to know about the action of these things, though I am not laying any stress upon that, went to a cinema and apparently, according to the finding of the justices, "commenced to leave the Rex Cinema and remembered no more than that he walked or was walking down the steps at the entrance of the cinema. He did in fact get into his motor-car, which he then drove from Wilmslow to Alderley Edge and then along a road known as Macclesfield Road, Over Alderley." They do not tell us whether he was going the right way home or the wrong way, but I assume he was going the right way. Then they say: "At a point approximately four miles from the Rex Cinema his car left the said roadway, went through the near-side hedge into an adjoining field, travelling a distance of some two hundred yards until it stopped in gear. The respondent was discovered by the landowner at or about 10.15 p.m. on the same day sitting rigidly at the wheel of his motor-car, but in a semi-comatose state"; and at the hospital or according to the medical evidence which, I suppose, was given after the examination at the hospital "the respondent had not sustained any apparent injury and was at the time of his examination in a hypoglycaemic coma due to the over-action of the insulin injection he had taken earlier." I am not attempting to construe the medical terms precisely, but what is found here is that his condition was due to an injection of insulin. I dare say he perfectly properly takes insulin because it has been prescribed for him. Unfortunately it may have the effect that has been described on a person, and the only question which the justices ask us is whether the taking of insulin by the respondent was, in the circumstances which occurred, to be regarded as taking a drug which would make him liable to be found guilty of an offence under section 15 (1).

In my opinion, for the purposes of this Act, insulin is a

drug. Many things can be taken by a person which are not drugs, but in my opinion, a drug means what I might for convenience call a medicament or medicine, something given to cure or alleviate or assist an ailing body. That is one definition. The definitions which are given in the Oxford Dictionary are very comprehensive, but I do not think the ordinary person—and after all motorists are ordinary people and the Act is supposed to be known by ordinary people—would have any doubt that a person taking insulin is taking what in ordinary parlance would be called a drug in the sense of a medicine. The language of the subsection is perfectly clear. It provides, as amended by section 55 and Schedule IX of the Road Traffic Act, 1956: “Any person who when driving or attempting to drive a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable,” to a penalty. The penalty, I need hardly say, is entirely at the discretion of the Bench. In the case of *THOMSON v. KNIGHTS* [1947] K.B. 336 I was referring to a self-induced state of incapacity, and I was distinguishing the case where the state of incapacity is caused by something a man does from the case where it is caused by something he does not do and is brought about by a heart attack or some illness. But what I went on to say was that the offence in that case was being in charge of the car when in this particular state of incapacity, and I adhere to the view I there expressed, providing the incapacity is caused by drink or a drug. I do not think it is necessary to consider the ingenious point Mr. Howard took, whether a non-alcoholic beverage is drink within the meaning of the Act. If that were so, I should be inclined to apply the dictum of Baron Martin which is on record, where the bailiff was sworn to keep the jury without meat or drink, or any light but candlelight, and a juryman asked if he might have a glass of water. Baron Martin said: “Well, it is certainly not meat and I should not call it drink. He can have it.” In my opinion, drink means alcoholic drink.

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It is impossible to say that the respondent was not under the influence of a drug, and therefore I think the case must go back with a direction that insulin is a drug for the purposes of this section. Therefore, the offence has been committed, but I am not inclined, and my brothers think the same, to send back the other two informations, one which charged him with driving without due care and attention and the other which charged him with driving without reasonable consideration for other persons using the road. It is only fair to him to say that he did drive off the road. At any rate, it is not necessary to send those informations back because one does not desire that a man should be prosecuted twice in the same circumstances. If he was driving without due care and attention, it was because he was under the influence of a drug. Justices may take into account a great many things, but they must remember, and everyone must remember, that this section was designed for the protection of the public, and if a person happens to be in a condition of health that renders him subject to go into a coma or liable to take remedies which may send him into a coma, the answer is that he must not drive, because he is a danger to the rest of Her Majesty's subjects. It is enough to say that we send this case back to the justices answering the question submitted to us by saying that the taking of insulin in such circumstances as occurred would make the respondent liable to be found guilty of the offence, and that he did commit the offence under section 15 (1) of the Act; but we do not send back the other summonses under section 12.

CASSELS J. : I agree. I am of the view that section 15 was purposely worded in the way in which it appears, namely, "Any person who when driving or attempting to drive a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable," and then follow the consequences.

I would define the word "drug" as being a substance used

as a medicine. The mischief which is sought to be provided against by this section is that if anyone should go on to a road with a dangerous thing like a motor vehicle and be under the influence of a drug to such an extent as to be incapable of having proper control of that vehicle, that is made an offence. It is little consolation to anybody who should unfortunately be injured by a person driving when under the influence of a drug for him to be told: "After all, I was under the influence of a drug and therefore it was not my fault." It may well arise in some future case and will then have to be decided whether anyone is negligent if he drives whilst under the influence of a drug. This drug is applied by injection. Insulin is injected into the system and anyone who has been in the Army knows very well that after inoculation against certain diseases one feels certainly a little under the weather, if I may use such an expression, and certainly not in a condition to have charge of a motor vehicle.

In my opinion this case should go back to the justices in the manner suggested by my Lord, and I agree with the course proposed.

LYNSKEY J.: I agree. Section 15 (1) was passed for the purpose of protecting the public using the roadways. In my view, in order to succeed, the prosecution have to prove two things, first of all, that the person accused was either driving or attempting to drive a motor vehicle on a road or public place. Having proved that, they have to prove that he was under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle. Having proved those two things, in my view, the prosecution have proved the case for which the section provides. I say that because it is quite clear that Parliament, in passing this particular section, was very concerned about persons driving on the public roads in a state of being under the influence either of drugs or drink, because subsection (2) of the same section makes it compulsory upon the court which convicts of this particular offence to disqualify the person from driving

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for the next twelve months unless there are special circumstances. I think the section was intended to keep off the roads, so far as it could, people attempting to take control or having control of motor vehicles while not having the power to do so through drink or drugs. I am satisfied that on the ordinary definition insulin would be treated as and is a drug. In those circumstances, I agree with what my brothers have said.

Appeal allowed.

Solicitors: Gregory, Rowcliffe & Co., for Hugh Carswell, Chester, for the appellant; Charles Russell & Co., for Skelton & Co., Manchester, for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
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R. v. HAVANT (HANTS) JUSTICES; *Ex parte* JACOBS

Probation—Supervising Court—Fresh Probation Order Made—Original Probation Order not Discharged—Extent of Period of Probation—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), ss. 3 (1), 5 (1), 6 (1), 6 (3) (a), Sched. V (1), (3).

In December 1955, B., a girl aged nineteen, was convicted of larceny at Poole Magistrates' Court and was placed on probation for two years with a condition of residence at a hostel in North London. In February 1956, B. was brought before the magistrate at the North London Magistrates' Court for a breach of the probation order. The magistrate gave her an absolute discharge and amended the order by substituting residence at an approved school in Hants for residence at the

hostel. As a consequence of this amendment, the Havant Magistrates' Court became the supervising court. B. committed a further breach of the original order and was brought before the Havant Magistrates' Court, and on May 4, 1956, that court made a new probation order for three years. B. committed a breach of the last-mentioned order, and was again brought before the court at Havant, who committed her for sentence to quarter sessions under section 28 of the Magistrates' Courts Act, 1952. Quarter sessions sentenced her to Borstal training. It was contended on behalf of B.'s mother that the order made by the Havant Magistrates' Court was invalid by the reason of the fact that the original probation order of December 1955 had not been discharged, and that the effect would be that B. would be on probation for a period exceeding three years, the maximum permitted by section 3 (1) of the Criminal Justice Act, 1948.

Held, that though the Havant Magistrates' Court had no power to discharge the original probation order, they had power as the supervising court under section 6 (3) of the Act to deal with the offender. If they decided to deal with her otherwise than by imposing a fine or making an order for attendance at an attendance centre (in a case where such an order was appropriate), they had power under paragraph (a) to deal with her in any manner in which they could have dealt with her if they had first convicted her of the original offence, which included the power to make a fresh probation order. They were not required to have regard to the fact that there was a previous probation order in existence except in so far as they had to find whether there had been a breach of that order. The original probation order, though not discharged, became *ipso facto* of no effect. The probation order made by the Havant magistrates on May 4, 1956 was, therefore, perfectly valid.

Application for order of *certiorari*.

Doris Ethel Jacobs, the mother of a girl named Audrey Helena Baker, moved for an order of *certiorari* to quash an order made by the Havant (Hants) Magistrates' Court on May 4, 1956, placing the girl on probation for three years. The ground of the application was that an earlier probation order in respect of the girl made on December 8, 1955, had not been discharged and that the effect of the later order would be that the girl would be under probation for a period exceeding three years, the maximum allowed by section 3 (1) of the Criminal

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Justice Act, 1948. The further facts, which are summarised in the headnote, appear fully in the judgment.

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C. Ingram Poole and A. R. Tyrrell, for the applicant.
D. A. Grant, for the respondent justices.

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On the conclusion of the arguments the LORD CHIEF JUSTICE said that the application would be refused, and that the court would give reasons for their judgment at a later date.

Cur. adv. vult.

Jan. 30, 1957. The following judgment was read by
THE LORD CHIEF JUSTICE: The judgment I am about to read is the judgment of the court.

In this matter Mr. Ingram Poole moved for an order of *certiorari* on behalf of Doris Ethel Jacobs, the mother of one Audrey Helena Baker, an infant, to bring up and quash a probation order made by justices for the county of Southampton sitting for the Petty Sessional Division of Havant made on May 4, 1956, whereby the said Audrey Helena Baker was required for a period of three years from the date of the order to be under the supervision of a probation officer for the Petty Sessional Division of Poole and ordering her compliance with certain requirements set out in the order.

The circumstances in which the order came to be made are these. On December 8, 1955, the said Audrey Helena Baker, then nineteen years of age or thereabouts, was convicted at the Magistrates' Court at Poole for the larceny of money and was put on probation for two years with the condition that she should reside at a hostel in North London. On February 20, 1956, the girl was brought before a metropolitan magistrate at the North London Magistrates' Court for a breach of this probation order and, in addition to giving an absolute discharge for the breach, the magistrate amended the order by substituting residence at St. Barbara's Approved School in the county of Hants for residence at the hostel in London. As a consequence of the amendment as to residence,

the Magistrates' Court at Havant became the supervising court for the purposes of the sections in the Criminal Justice Act, 1948, dealing with probation orders, and the girl, having committed a further breach of the order, was brought before the Magistrates' Court at Havant on May 4, 1956, and that court then made a new probation order for a period of three years.

To complete the history, it seems that the girl again committed a breach of the last-mentioned probation order and on June 7, 1956, she was committed to Quarter Sessions under section 28 of the Magistrates' Courts Act, 1952, and there sentenced to Borstal training and she is at present detained in a Borstal institution at Aylesbury. The ground upon which this motion was made was that the justices at Havant had no power to make the probation order of May 4, 1956, because it was said that, as the original probation order had never been discharged, the effect of the new order would be that the girl would be under probation for a period exceeding three years. We were informed that the question raised on this motion is one which has caused justices and their clerks some doubt and that it has been the subject of discussion in legal journals, and accordingly, in dismissing the application at the close of the argument, we said that we would put our reasons for so doing in writing and now proceed to give them.

By section 3 of the Criminal Justice Act, 1948, it is provided that where a court before which a person is convicted of an offence is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years. By section 5 (1) the provisions of the First Schedule to the Act shall have effect in relation to the discharge and amendment of probation orders, and by the first clause of that Schedule it is provided that the court by which

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a probation order was made may, upon application made by the probation officer or by the probationer, discharge the order. That is the only specific provision in the Act with regard to the discharge of a probation order. Clause 2 of the First Schedule contains provisions as to the amendment of an order and gives power to the supervising court to make amendments, but also contained in clause 3 is a proviso that the court shall not amend a probation order by reducing the probation period, or by extending that period beyond the end of three years from the date of the original order. Section 6 (1) provides that, if during the term of probation the probationer has failed to comply with any of the requirements of the order, he may be summoned to appear before the court, including the supervising court. Section 6 (3) provides that, if it is proved to the satisfaction of the court that the probationer has failed to comply with any of the requirements of the probation order, that court may, without prejudice to the continuance of the probation order, impose on him a fine not exceeding ten pounds or, in a case to which section 19 of the Act applies, make an order requiring him to attend at an attendance centre or may (a) if the probation order was made by a court of summary jurisdiction deal with the probationer for the offence in respect of which the probation order was made in any manner in which the court could deal with him if it had just convicted him of that offence.

The offence in respect of which the probation order was made was the larceny committed on December 8, 1955, and it is quite clear that had the supervising court, that is to say, the Havant justices, dealt with the probationer for that offence one of the manners in which they could have dealt with her on the conviction would have been to have made a probation order under section 3 (1). Accordingly, in the opinion of the court, it follows that the justices at Havant were enabled by this section to make the probation order that they did. They could not discharge the original probation order. That could only be discharged by the court at Poole, the court that made

the order, and only on the application of the probation officer or the probationer, and no such application was made by either.

Now it will be observed that section 6 (3) enables the court before whom a probationer is brought for failure to comply with the order to impose a fine not exceeding ten pounds or to make an order requiring him to attend at an attendance centre without prejudice to the continuance of the probation order. That last provision as to the continuance of the probation order does not apply if the justices act under the provisions of sub-clause (a) and decide to deal with him in any manner in which they could have dealt with him if they had just convicted him of that offence. They are not required, therefore, to have regard to the fact that a previous probation order is in existence except in so far as they have to find whether there has been a breach of that order and, in the opinion of the court, it follows that, once the supervising court intend to deal with the case otherwise than by imposing a fine of ten pounds or making an attendance centre order, the effect is that the previous probation order can no longer have effect. It is clear that for a breach of an order justices can sentence the probationer to prison. The probation order could have no effect during the sentence of imprisonment. It is also clear that the supervising court could send the probationer forward to quarter sessions, as was ultimately done in this case, with a view to a Borstal sentence and if the original court making the order was a Court of Assize or of Quarter Sessions could themselves sentence to imprisonment or Borstal. Having that power, if the court is of opinion that it is expedient to make a probation order instead of sending the offender to prison or to Borstal, we can see no reason why they should not make a probation order for not more than three years. It will be this order that will control the probationer and the former order, though not formally discharged, will be ineffective. The proviso to paragraph 3 of the First Schedule does not really cause any difficulty, because that only prohibits a court which

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is asked by the probation officer or by the probationer to amend an existing order from extending the period of that order beyond the term of three years.

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For these reasons we are of opinion that the justices had power to make the order which they did and that this application fails.

Application refused.

Goddard
L.C.J.,
Cassels J.,
Lynskey J.

Solicitors: Barnes & Butler, agents for J. W. Miller & Son, Poole, for the applicant; Theodore Goddard & Co., agents for G. Andrew Wheatley, Winchester, for the respondent justices.

[IN THE PRIVY COUNCIL]

BEFORE

LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD
KEITH OF AVONHOLM AND LORD SOMERVELL OF HARROW

MAWJI AND ANOTHER v. REGINAM

*Conspiracy—Husband and Wife Alone Incapable of Conspiracy—
Applicability of Rule to Potentially Polygamous Marriage.*

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The rule of English criminal law that a husband and wife alone cannot be guilty of conspiracy held applicable in Tanganyika to a potentially polygamous marriage valid by the law of Tanganyika.

Quaere, whether the rule would apply in England to a potentially polygamous marriage.

Appeals against convictions and sentences.

The appellants, Kassam Ali Karim Mawji and Laila Jhina Mawji, who were husband and wife, were convicted on January 3, 1955 in the District Court of Dar-es-Salaam of conspiracy to obstruct, prevent, pervert or defeat the course of justice, contrary to section 110 (a) of the Penal Code of Tanganyika, and were sentenced to two months' imprisonment with hard labour. They were also convicted on another charge, which is not material for the purposes of this report. On January 19, 1955, the High Court of Tanganyika dismissed appeals by the appellants against their convictions, but increased the sentences for conspiracy in each case to one year's imprisonment. On August 1, 1955, the Court of Appeal for Eastern Africa dismissed the husband's appeal and also the wife's appeal as far as the charge of conspiracy was concerned, but allowed her appeal on the other charge. The appellants obtained special leave to appeal to the Privy Council against their convictions of conspiracy.

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The appellants were lawfully married in accordance with the rules of the Khoja Sect (a sub-sect of the Shia Sect of Moham-medans) and were living together in a common matrimonial home under conditions in all respects similar to those of a monogamous marriage.

A. R. Campbell, for the appellants.

James Stirling, q.c. and *D. A. Grant*, for the Crown.

LORD SOMERVELL OF HARROW: The first appellant is described in the charge as the wife of the second appellant, and both as Ismaili Khojas. At the end of the evidence for the prosecution, it was submitted for the defence that the accused, being husband and wife, could not be guilty of conspiracy. It was submitted that the rule of English law to this effect applied to the appellants. This raised two issues. First, whether, under provisions of the law of Tanganyika to be referred to later, this rule of English criminal law was applicable to Tanganyika; secondly, whether, if it was applicable, it applied to the appellants, whose marriage was, it is now conceded, potentially polygamous. The magistrate decided that the rule of English law was applicable, but did not apply to a potentially polygamous marriage. Both appellants were convicted. The High Court and the Court of Appeal for Eastern Africa were of the same opinion as the magistrate. On June 1, 1956, the appellants were given special leave to appeal limited to the count of conspiracy. The decision on the first point was, of course, in the appellants' favour.

The Crown submitted before the Board that the courts below were wrong on this point and it is convenient to deal with it first. Section 110 of the Tanganyika Penal Code is as follows: "Any person commits a misdemeanour who— (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice" Section 4 of the Code is as follows: "This Code shall be interpreted in accordance with the principles of legal interpretation obtaining

in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith." The question is whether the rule is incorporated into section 110 (a) by section 4.

The rule is stated in Archbold's *Criminal Pleading, Evidence and Practice*, 33rd ed., p. 22: "A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will." The authority cited is Hawkins's *Pleas of the Crown* (1 Hawk. c. 27, s. 8). Hawkins begins by quoting the Statute Ordinacio de Conspiratoribus, 1305 (33 Edw. 1) "that conspirators be they that do confeder or bind themselves by oath, covenant," etc. He goes on to consider the scope of the offence and its punishment. He deals with this matter in section 8: "It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will." As in the present case, Hawkins was considering, *inter alia*, whether the rule modified the generality of words used in a statute or ordinance. Hawkins refers to Stanford's *Pleas of the Crown*, p. 174, which refers to the rule as accepted in the fourteenth century. Citations from other authorities and textbook writers can be found in *KOWBEL v. R* [1954] 4 D.L.R. 337. It was not disputed that the rule is part of the English criminal law.

It was submitted for the Crown that, applying section 4 of the Penal Code, substantive law must be distinguished from "interpretation" and "meaning." It may be difficult to define the limits of the effect of section 4. The contrast

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between substantive law and interpretation does not seem to assist. The most obvious form of interpretation will extend or restrict the application of words and thereby effect the substantive law. Their Lordships are of opinion that the rule is incorporated into the provisions of section 110 (a). The words "conspires" and "conspiracy" in English criminal law are not applicable to husband and wife alone; the words "other person" in section 110 (a), if English criminal law is applied to their "interpretation" or "meaning," cannot, in this context, include a spouse. On this point their Lordships agree with the courts below.

On the second point, the Court of Appeal came to their conclusion "after much consideration," and their Lordships agree that the point is not an easy one. Their Lordships accept the submission of the Crown that the rule is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person. Some of the consequences of the fiction have been removed or modified by statute. This has not. In the criminal law of Tanganyika, the words husband and wife, if unqualified, are not restricted to monogamous unions. If it is desired to deal with monogamous as distinct from other marriages, express words are used. [His Lordship referred to various provisions of the Criminal Procedure Code, and continued:] It is clear, of course, that marriages primarily contemplated by the rule in England were monogamous marriages, but, the rule being now part of the criminal law of Tanganyika, their Lordships are of opinion that it applies to any husband and wife of a marriage valid under Tanganyika law. It was submitted for the Crown that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Potentially polygamous marriages have been recognised for various purposes in this country: *BAINDAIL* (otherwise *LAWSON*) *v.* *BAINDAIL* [1946] P. 122. It may be that such a marriage would be recognised for the purpose of this rule. Their Lordships express no opinion on this point. The rule plainly applies here at least to marriages recognised as fully

valid, and it should, therefore, apply in Tanganyika to marriages recognised as fully valid there. It was not suggested that the appellants' marriage was not in that category.

Their Lordships have, therefore, humbly advised Her Majesty that the appeal should be allowed and the convictions [for conspiracy] quashed and the sentences set aside.

*Appeal allowed.
Convictions quashed.*

Solicitors: Theodore Goddard, for the appellants; Charles Russell & Co., for the Crown.

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[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE LYNSEY

RIGBY v. WOODWARD

1957
January 17

Evidence by One Prisoner against Co-Prisoner—Refusal to Allow Co-Prisoner's Advocate to Cross-Examine Prisoner—Conviction Quashed—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f) (iii).

The appellant and a co-prisoner were charged before magistrates with unlawfully wounding one W. The co-prisoner gave evidence on his own behalf which incriminated the appellant. The appellant's solicitor desired to cross-examine the co-prisoner, but the magistrates declined to allow him to do so. The magistrates convicted the appellant and acquitted the co-prisoner. The appellant appealed to the Divisional Court by Case Stated.

Held, that the magistrates, in refusing to allow the appellant's solicitor to cross-examine the co-prisoner, had departed from the ordinary principles of justice and that the conviction

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was, therefore, wrong in law within the meaning of section 87 (1) of the Magistrates' Courts Act, 1952.

HADWEN [1902] 1 K.B. 882 applied.

Held, further, that, the appeal being by Case Stated and not by *certiorari*, the court had no power either under section 6 of the Summary Jurisdiction Act, 1857, or section 87 (1) of the Magistrates' Courts Act, 1952, to order a retrial, and had, therefore, no other course open to them than to quash the conviction.

Case Stated by Reading justices.

An information was preferred by the respondent Charles Woodward, a chief inspector of police, charging the appellant, David Stanley Rigby, that he, together with one Quelch ("the co-prisoner"), unlawfully and maliciously wounded Raymond Lenning Waters, contrary to section 20 of the Offences against the Person Act, 1861.

The case was dealt with summarily at Reading Magistrates' Court on May 9, 1956, and both the appellant and the co-prisoner pleaded Not Guilty. The co-prisoner gave evidence on his own behalf, in the course of which he said that the appellant hit Waters from behind. The appellant's solicitor desired to cross-examine the co-prisoner, and the justices retired to consider the matter. They were referred to HADWEN [1902] 1 K.B. 882 and a note in the *Law Society's Gazette* of May, 1956, containing a reference to the point before them. They were of opinion that they ought to exclude from their minds evidence of one co-prisoner tending to incriminate another co-prisoner and refused to allow the appellant's solicitor to cross-examine the co-prisoner. They convicted the appellant and sentenced him to six months' imprisonment and acquitted the co-prisoner. The appellant appealed to the Divisional Court.

H. B. Grant, for the appellant.

Paul Wrightson, for the respondent.

THE LORD CHIEF JUSTICE: The appellant and his co-prisoner were alleged to have attacked the complainant in a public convenience by hitting him with a bicycle chain, one of the worst

form of coshes known. If they did that, it was a cowardly and brutal assault. I am surprised, especially as the appellant had been convicted before, that the justices thought that it was proper for them to adjudicate on the case. They should have committed the appellant for trial, as it was a very serious attack.

The co-prisoner went into the witness box on his own behalf. In his evidence he said that it was not he, but the appellant, who hit the complainant and he thus gave evidence against the appellant. Naturally enough, the appellant's solicitor desired to cross-examine him, and for some reason which this court finds very difficult to understand the justices decided that they would not allow the witness to be cross-examined. They say that they retired to consider the point. I should have thought that their clerk would have told them at once that they must allow the co-prisoner to be cross-examined. Perhaps he did, and perhaps the justices refused. Their attention seems to have been called to *HADWEN* [1902] 1 K.B. 882, which decided in terms, soon after the Criminal Evidence Act, 1898, s. 1 (f) (iii) came into force that, if one prisoner gives evidence against another prisoner, he is liable to be cross-examined by the other prisoner's counsel, and their attention was, apparently, called also to a note in the *Law Society's Gazette* of May, 1956, to the same effect. Yet the justices still persisted in their refusal to allow the cross-examination, and now they say that they did so because they thought that it was their duty to put out of their minds the evidence which the co-prisoner had given. That evidence had been properly given and the justices considered it, as they were bound to do, and acquitted the co-prisoner. The justices seem to have entirely overlooked the fact that, if cross-examination had been allowed, the appellant's solicitor might have managed to get some admission out of the co-prisoner or show him to be such an unreliable witness that doubt would have been thrown on the question whether the appellant was the assailant. One cannot stop a witness who has given evidence against a prisoner from being cross-examined, nor can one pay attention to the evidence

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he has given for one purpose, but not for another purpose. I am always loth to blame justices for making mistakes, and I am not going to do it beyond saying that I cannot understand why they refused to allow the cross-examination. I am certain that no experienced justices' clerk would ever have allowed justices to take up this line.

The much more difficult question is to decide what course this court can take. Ordinarily this matter would have been brought before the court on a motion for *certiorari* and the refusal to allow a witness who had given evidence against a prisoner to be cross-examined would have been said to be a departure from the common principles of justice. We should then have had to consider whether the irregularity was such that we ought to quash the conviction. The matter has been brought before us by Case Stated, an unusual proceeding. The enactments which deal with Cases Stated are two. First, section 87 (1) of the Magistrates' Courts Act, 1952, provides: "Any person who was a party to any proceedings before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved." It seems to me that the appellant in the present case does question the decision of the justices on the ground that it is wrong in law, because, if justices proceed in this way, it cannot be said that the conviction is one which has been obtained in the due and proper course of law. A radical departure from the well-known principles of justice and procedure seems to me to make a decision given after the departure wrong in law. The second enactment is section 6 of the Summary Jurisdiction Act, 1857, which first enabled courts of summary jurisdiction to state cases and which (as amended by the Act of 1952) provides: "The court to which a case is transmitted under the Magistrates' Courts Act, 1952, shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm,

or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the court may seem fit. . . .” Sometimes justices before they have decided a case have some question of law arising before them and they state a case and ask for the opinion of the court. There are often cases in which justices dismiss the information and the prosecution brings the case up, saying that there has been a mistake of law or on the facts proved and that it follows that the only proper decision should have been a conviction; or again a defendant may bring the case up and say that on the facts found by the justices he was entitled to be acquitted. There is no power here to order a re-trial. From time to time where justices have dismissed an information, this court has, on finding that they were wrong in dismissing the information, ordered that they should resume the hearing of the case because, for example, they have not heard the defence. If we sent the present case back, I do not see how the justices could deal with it. The co-prisoner, having been acquitted, might not be found. We do not know where he is or whether he can be called. We cannot make the prosecution call him.

Here an unfortunate departure from the ordinary principles of justice has resulted in a conviction, and, although it may be that the appellant is guilty and that the justices were right in convicting him, we cannot allow a proceeding of this sort to stand. We must decide the question of law that is raised here in favour of the appellant and, as it is impossible for us to order a re-trial, it follows that the conviction must be quashed. I regret that that is the only decision which we can give.

CASSELS J. : I agree.

LYNSKEY J. : I agree with great reluctance, but it seems to me that the justices clearly have gone wrong. They have deprived the appellant of the right to obtain certain evidence

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from the co-prisoner. That co-prisoner has now been acquitted. The result is that we cannot order a new trial because the co-prisoner cannot be brought back. The justices made an error which we cannot put right, and, that being so, there is no course open to us except to quash the conviction.

Conviction quashed.

Solicitors: Martin & Nicholson, agents for M. Owen Wellbe-
love, Reading, for the appellant; Sharpe, Pritchard & Co., agents
for the Town Clerk, Reading, for the respondent.

[MIDLAND CIRCUIT]

BEFORE

MR. JUSTICE FINNEMORE

1957
January 18

R. v. CURPHEY

*Road Traffic—Causing Death by Dangerous Driving—Meaning of
“Causing”—Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67),
s. 8.*

On a charge of causing death by dangerous driving, contrary to section 8 of the Road Traffic Act, 1956, the jury must be satisfied that the dangerous driving was the substantial, although it need not have been the sole, cause of the death of the victim.

Trial at Bedfordshire Assizes before Finnemore J. and a jury.

The prisoner was charged with causing the death of a motorcyclist by the dangerous driving of a motor-car, contrary to section 8 of the Road Traffic Act, 1956. The evidence showed that, at a time when visibility was restricted through fog to about sixty yards, on a bend on a usually busy road marked

by a continuous white line, the prisoner pulled out to pass at least one of two vehicles which were in front of him. He said that his speed when overtaking was about thirty to thirty-five miles per hour, which the prosecution did not suggest was excessive. Before the prisoner got back fully on to his near-side, a motor-cyclist came round a bend in the opposite direction, collided with great force with the prisoner's car, and was flung through the air for several yards. He died as a result of the injuries which he sustained. The evidence with regard to the prisoner's position on the road when he was overtaking was conflicting. Witnesses for the prosecution stated that the motor-cyclist was on his correct side of the road, about two feet from the white line, and that he was wearing a crash helmet and appeared to be looking down on the road. Evidence was given that after the collision the speedometer on the motor-cycle was found to be jammed and recorded a speed of forty miles per hour.

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J. Malcolm Milne, for the Crown.

T. H. K. Berry, for the prisoner.

FINNEMORE J. directed the jury that, in order to establish the offence charged, they must be satisfied first that the prisoner was doing a dangerous thing in driving as he did in the circumstances prevailing at the time, and that secondly, if they were satisfied that he was driving dangerously, that he caused the death of the motor-cyclist thereby. If they were satisfied on the first point, but not on the second, they were entitled under section 8 (4) of the Act, to return a verdict of guilty of dangerous driving.

After retiring, the jury came back with a request for further direction. They said that they were satisfied that the prisoner was driving dangerously, but wished to know of what they had to be satisfied in order to find that he caused the death of the motor-cyclist. After conferring with counsel, FINNEMORE J. further directed the jury that they must be satisfied that the

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dangerous driving was the substantial, although it need not have been the sole, cause of the motor-cyclist's death.

The jury then convicted the prisoner of dangerous driving, and he was fined £50 and disqualified for holding a licence for five years.

Solicitors: Poole & Co., Bedford, for the prisoner.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE LYNSKEY

1957
January 21

GEORGE SPENCE

Murder—Killing During Attempted Suicide.

If a person, intending to kill himself and, in the course of the attempt to kill himself, kills another person, he is guilty of the murder of that other person.

HOPWOOD (1913) 8 Cr.App.R. 143 followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 10, 1956, of murder and was sentenced by Glyn-Jones J. to death.

The evidence showed that the deceased, who was a woman with whom the appellant had been carrying on an illicit relationship for some time, had died from stab wounds in the breast. The defence was that the appellant had not intended to harm the woman, but intended to stab himself and that the deceased woman had been killed in the course of a struggle for the knife. There was, however, evidence that the appellant had wilfully killed the deceased. Glyn-Jones J. directed the jury that if the deceased was struck by the knife which the appellant was at that moment using for the purpose of taking

his own life, then the appellant was engaged in the felony of self-murder and the killing, although the appellant may not have intended to kill the deceased at all, was in those circumstances murder.

Peter Rawlinson, for the appellant. There is no specific point of law which can be urged on behalf of the appellant, nor is there any specific allegation of misdirection. The court is, however, invited to have regard to all the circumstances of the case and to consider whether the conviction can be regarded as satisfactory.

R. E. Seaton and *J. Mervyn Griffith-Jones*, for the Crown were not called on to argue.

CASSELS J. [after stating the facts:] When it transpired in the course of the case that that was the position, it was quite clear what was the law on the matter. If A, intending to kill himself, and in the course of that attempt, kills another, in law that is murder, and there is ample authority to support that proposition. *HOPWOOD* (1913) 8 Cr.App.R. 143, is a case which was tried before the late *Avory J.* many years ago and reached this court, the judgment being given by the Lord Chief Justice (Lord Alverstone). The summing-up of the learned judge who tried the appellant concluded or almost concluded with these words: "I have to direct you to this effect: if the account which he [the appellant] has given in the witness-box as to the manner in which Mrs. Willis came to her end is proved, if it is proved that she was struck by the knife which he was at that moment using for the purpose of taking his own life, and was in fact swinging the knife at his own breast intending to kill himself, he was actually engaged at the time in the felony of self-murder, and her killing by him in those circumstances, though he may not have meant to kill her at all, is murder. There is no other direction in law that I can possibly give you." In addition to that, it is to be observed, as one reads through the evidence in this case, that there was in fact ample evidence for the careful consideration

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of the jury that the appellant killed the woman. Apart altogether from the suggestion which was put forward that there had been an illicit relationship between them, there had been disputes, and the condition of affairs between them at the moment when the woman met her death was such that there was, at any rate, some evidence before the jury that there was a wilful killing of her.

In those circumstances, this court is quite unable to interfere with the verdict. The summing-up was a proper one, and the evidence was there to support the verdict. The appeal is, therefore, dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE HINCHCLIFFE

1957
February 4

REGINALD DENNIS BUTT

Sentence—Robbery with Violence—Snatching of Money from Messengers.

Observations on severe sentences being necessary in the case of persons found guilty of snatching money from messengers carrying wages.

Appeal against sentence.

The appellant was convicted at Lincolnshire Assizes on October 31, 1956, of housebreaking and of carnal knowledge of a girl aged fifteen and was sentenced by Stable J. to three years' imprisonment and one year's imprisonment (consecutive). The appellant did not appeal against either of these sentences. On November 30, 1956, he was convicted at the Central Criminal Court of robbery with violence committed in September, 1956, and was sentenced by the Commissioner

(Judge Aarvold) to four years' imprisonment consecutive to the previous sentences. During the course of the case the girl referred to in the charge of carnal knowledge in Lincolnshire, who had been called as a witness for the prosecution at the Central Criminal Court, passed by the dock and the appellant struck her in the face as she passed. Judge Aarvold ordered a bill to be preferred against the appellant for this assault. The appellant pleaded Guilty and was sentenced to a further term of twelve months' imprisonment, making nine years in all. The appellant appealed against both the sentences passed at the Central Criminal Court.

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Hinchcliffe J.

No counsel appeared.

THE LORD CHIEF JUSTICE: This is a case which has caused the court some anxiety. The appellant, who is only twenty-four years of age, has been found Guilty of very serious offences and the sentences he received total nine years in aggregate. The history of the case is this: in September, 1956, with another young man aged twenty-two, he violently assaulted two women who were going back with wages from the bank to their place of employment. One knows that this type of offence is increasing and getting far too common and must be dealt with severely. I do not think that such offences have been sufficiently seriously dealt with previously and, the sooner men who commit this type of crime know that they will find themselves in prison for long periods, the better.

The appellant besides attacking the two women obtained £465 during the robbery. He then went to Lincolnshire with a girl of fifteen and was arrested at Lincoln for housebreaking. He was brought before the judge of assize on October 31, 1956, charged with housebreaking and carnal knowledge of the girl, and received a sentence of three years for the housebreaking and one year consecutively for the carnal knowledge. He was brought back to the Central Criminal Court for his attack on the two women and the theft of the wages. Judge Aarvold

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sentenced him to four years' imprisonment consecutive to the earlier sentences. In the course of the case the girl who had accompanied the appellant to Lincoln was called as a witness for the prosecution and the appellant leant over the dock and struck her about the face as she passed. The judge ordered a bill to be preferred against him for assault and the appellant pleaded Guilty to it and received twelve months' imprisonment. The judge did not treat the attack as a matter of contempt of court, as he might have done, but ordered the bill to be preferred, and that seems the better course.

Sometimes that sort of thing happens in magistrates' courts, and in that case a very useful procedure by magistrates would be to order a summons at once to be served on the defendant returnable *instantly*, and then they can deal with the matter as an assault.

The result in the present case is that there are sentences of nine years on the appellant, since those imposed at the Central Criminal Court were consecutive, and that is a longer period than is approved by the court in such cases as a rule. The court has had very considerable doubt whether they ought to interfere at all, but, in our opinion, at the appellant's age nine years is possibly too long a sentence. The offence of carnal knowledge was not in the present case a bad one, as the girl was nearly sixteen and the appellant was a young man. Although the sentences at Lincoln are not formally before us, we are going to treat the matter as though we had given leave to appeal in the Lincoln case, and we shall therefore order that the one year's imprisonment for carnal knowledge shall run concurrently with the sentence of three years for housebreaking. We have decided that, so far as the sentence at the Central Criminal Court is concerned, the four years for the robbery with violence must stand, and it will be a good thing that young ruffians such as these should know that offences of attacking messengers taking back wages to their employers will be severely punished; but the sentence for the assault, as the girl was not hurt very much, although it was an outrageous thing to do, will be reduced to six months.

The result will be that the appellant will serve seven and a half years' imprisonment. All these reductions will take place from the date of the conviction at the Central Criminal Court.

Sentences reduced.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE HINCHCLIFFE

DENNIS JOHN HACKER

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Blackmail—Demanding with Menaces—Committal to Assizes rather than Quarter Sessions Desirable—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 30.

As all cases of blackmail are more appropriately tried at assizes than at quarter sessions, cases of demanding money with menaces, contrary to section 30 of the Larceny Act, 1916, though triable at quarter sessions, should be committed to assizes and not to quarter sessions, unless there is some very compelling reason to the contrary.

Application for leave to appeal against conviction.

The applicant was convicted at Andover Quarter Sessions on November 10, 1956, of demanding money with menaces, contrary to section 30 of the Larceny Act, 1916, and was sentenced by the Recorder (E. S. Fay, Esq.) to four years' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: There is no ground whatever for giving leave to appeal in this case. This applicant was convicted of blackmail, demanding money with menaces, and received a sentence of four years' imprisonment, which he richly deserved. There is nothing whatever in his grounds of

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appeal. He seems to have got it into his head that he was justified in doing what he did, but it is impossible to find any ground on which we could give leave to appeal. The conviction was the only possible verdict, but I want to say this: He was tried at Andover Borough Quarter Sessions, being sent there under the provisions of section 14 (2) of the Criminal Justice Act, 1925, which enabled him to be sent to any convenient court if the assizes for the county were not to be held for some time. The court desires to say that the case was admirably tried by the learned Recorder, and his summing-up was as good as could be desired, but, generally speaking, a case of blackmail ought not to be sent to quarter sessions; it ought to be sent to assizes. It is true that this charge was not under section 29 of the Larceny Act, 1916, which imposes a sentence of imprisonment for life as the maximum sentence; it was a charge under section 30, for which five years' imprisonment is the maximum, but, as a general rule, a case of this nature should go to assizes. I hope magistrates will take note of what we say: Charges of blackmail ought to be sent to assizes and not to quarter sessions, unless there is some very compelling reason.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE HINCHCLIFFE

RONALD EDWARD SHARP
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*Affray—No Direct Evidence of any Person being Put in Terror—
Circumstances such that Reasonable People might have been
Frightened—Self-defence—Availability of Defence.
Common Law Riot—Ingredients of Offence.*

On a charge of making an affray in a public place it is not necessary that there should be direct evidence of any person having been put in terror; it is sufficient to prove such circumstances that reasonable persons might have been intimidated or frightened by the conduct of the persons charged.

The defence of self-defence is available on this charge, as a person who merely defends himself against the attack of another and does not attack himself is not guilty of affray.

Quære, whether on a charge of common law riot it is necessary for the prosecution to call at least one person of reasonable courage and firmness to prove that he was alarmed by the force or violence displayed.

Dicta in *FIELD v. METROPOLITAN POLICE RECEIVER* [1907] 2 K.B. 853, at p. 860 doubted.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on December 4, 1956, of having in a public street and highway unlawfully fought and made an affray and were each sentenced by the Recorder of London to twelve months' imprisonment.

A police constable found a large crowd assembled at a road junction watching a fight between the appellants on the opposite pavement. They were still aiming blows at each other, but appeared to be exhausted and their faces and clothes were covered with blood. The constable separated them and the appellant Johnson, who had a severe cut on the head, gave him a razor with which he said the appellant Sharp had cut him and which he had taken from him. The officer then went after Sharp, and found that part of his left ear had been torn or bitten off, that two of his upper teeth had been knocked out, and that he had a black eye and a cut lip. Each of the appellants blamed the other for starting the fight and the appellant Sharp contended that he had acted only in self-defence. The Recorder directed the jury that, if they should find that reasonable people might have been intimidated or frightened by the conduct of the appellants, that would be sufficient in law, although there was no direct evidence of anyone being put in terror, and that it was immaterial who started

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the fight or who was to blame and that the question of self-defence did not arise.

The Recorder gave a certificate of appeal on the question whether, in the absence of any direct evidence that anyone was put in terror, it is sufficient to constitute the offence of affray if there is proof that the fight was between two persons in a public place and of such a nature as might well intimidate or frighten reasonable people.

Edward Clarke, for the appellant Sharp.

The learned Recorder was wrong in directing the jury that on a charge of affray it was enough to establish that the fight was of such a character as might well frighten reasonable people, and that proof need not be given of anyone actually being frightened. Although there are no authorities on this point concerning the offence of affray, on a charge of riot also it is necessary that it should be "to the terror of the public." In *FIELD v. METROPOLITAN POLICE RECEIVER* [1907] 2 K.B. 853, the Divisional Court held that a necessary element of riot was to alarm at least one person of reasonable firmness and courage. This has been followed in *MUNDAY v. METROPOLITAN POLICE RECEIVER* [1949] 1 All E.R. 387.

The learned Recorder was also wrong in directing the jury that on a charge of affray it did not matter who started the fight or who was to blame and that no question of self-defence was relevant. In an affray both parties must be fighting unlawfully and so, if a person is acting in self-defence or in course of duty, then he is not guilty of affray.

D. H. Farquharson, for the appellant Johnson, adopted a similar argument.

Alastair Morton, for the Crown.

The requirement that an affray must be to the terror of the public stems from Coke, whose definition is "An affray is a public offence to the terror of the King's subjects," (*Institutes*, Part 3, Chap. 72, p. 157). The later jurists and textbooks—*Hawkins*, *Blackstone*, *Burn*, *Halsbury*, *Archbold*, *Russell*, *Roscoe*—

merely repeat it. An examination of Coke and of Hawkins (*Pleas of the Crown*, Curwood's edition, Vol. 1, Chap. 28, pp. 487 *et seq.*) shows that to them it was a matter of assumption that a fight in a public place would naturally frighten other people. Coke says, "... the very combat for revenge is an affray, a great breach of the King's peace, an affright and terror to the King's subjects," (p. 158). Hawkins uses the phrases "... in such a manner as will naturally ..." (p. 488), and "... as are apt to terrify ..." (p. 489). No reported criminal case carries the requirement any further. It is not necessary to prove that anyone was frightened, provided the fight was of such a nature as would naturally frighten. With regard to riot the requirement that at least one person of reasonable courage must have been alarmed originates in *LANGFORD AND OTHERS* (1842) C. & M. 602, which was decided on very peculiar facts. Even in *FIELD v. METROPOLITAN POLICE RECEIVER* (*supra*) the court (at p. 860) in defining riot used the phrases "displayed in such a manner as" and "such as would be calculated" to alarm. Compare also *PITCHERS v. SURREY COUNTY COUNCIL* [1923] 2 K.B. 57.

With regard to self-defence, it is conceded that this could be a good defence. It would mean there was no fight; but it could not arise on the facts of the present case.

Cur. adv. vult.

February 15. The judgment of the court was read by

THE LORD CHIEF JUSTICE: These appellants were convicted at the Central Criminal Court before the Recorder of London on a count charging them jointly with having in a certain public street and highway, to wit, the Highway, Stepney, unlawfully fought and made an affray. They were each sentenced to twelve months' imprisonment. They appeal on a certificate granted by the Recorder, the ground being whether, in the absence of any direct evidence that anyone was put in terror, it is sufficient if there is proof that the fight was between

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two persons in a public place and of such a nature as might well intimidate or frighten reasonable people. They have also delivered notices of appeal raising the question of law as to the direction given by the Recorder to the jury that the defence of self-defence was immaterial and irrelevant and that it was immaterial who started the fight or who was to blame for it.

The evidence was that on a day last September shortly after noon a police constable found a large crowd assembled at the junction of Wapping Lane and the Highway, Stepney, watching a fight between these two appellants, who were fighting on the opposite pavement. They were still aiming blows at each other with their fists, but appeared to be exhausted; their faces and clothes were covered with blood. Johnson had a severe cut on the head. The officer separated them and Johnson then gave him a razor with which he said Sharp had cut him and which he had taken from him. The officer then went after Sharp and stopped him and found part of his left ear had been torn or bitten off; two of his upper teeth had been knocked out and he had a black eye and a cut lip. Each of the appellants made statements; Johnson admitted he stopped Sharp, with whom he had had a previous quarrel, and said: "Now what about it, now you are on your own," and then Sharp attacked him with the razor and he admitted he had bitten Sharp. The latter, whom it is perhaps only fair to say is to some extent disabled by poliomyelitis, admitted that he had a razor, but said he only used it in self-defence when attacked by Johnson. That being the evidence, it was objected that it did not support the charge of making an affray, because no evidence was given that any person was put in terror, and the question we have to decide is whether it is necessary to call at least one person to say that he or she was put in fear by the conduct of the appellants, or whether it is enough, as the Recorder held, that the circumstances were such that the jury might find that reasonable people might well be intimidated or frightened.

It is remarkable what a lack of authority there is with regard to this offence. There seems to be no reported case

which deals with it. It is barely mentioned in Hale. Coke devotes a chapter in his *Third Institute* (c. 72, p. 157) to private fights, duels and affrays; he says that an affray is a public offence to the terror of the King's subjects and that it is enquirable in the *leet* as a common nuisance, and a perusal of the paragraphs which deal with the subject certainly suggest that, in his opinion, the fact that a combat in public is a great breach of the Royal peace is *ipso facto* an affright and terror to the subjects. Blackstone in Book IV, p. 145, described the offence as the fighting of two or more persons in a public place, to the terror of the King's subjects, and evidently considers that those taking part in a duel can be indicted for an affray. That would also seem to negative the necessity of calling evidence to prove that someone was actually put in terror, as duels were generally, one would suppose, fought with as little publicity as possible and those present in the capacity of seconds or surgeons would, of course, not be put in fear. The author who devotes most attention to the matter is Hawkins, Volume 1, Chapter 28. He lays down that there may be an affray when there is no actual violence, as when a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people. This, he says, was always an offence at common law and dealt with by many statutes. He then quotes in particular the Statute of Northampton, 1330 (2 Edw. 3, Chap. 3). Dealing with that statute, he says that no wearing of arms is within the meaning of this statute unless it be accompanied with such circumstances as are apt to terrify the people. The wearing of unusual or dangerous weapons in public is only one species of affray and, in our opinion, it is open to a jury to find that the circumstances amount to an affray although no person is actually called to say he was put in terror. Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray, while the carrying in public of a studded mace or battle axe might be, so, if two lads indulge in a fight with fists, no one would dignify that as an affray, whereas,

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if they used broken bottles or knuckle dusters and drew blood, a jury might well find it was, as a passer-by might be upset and frightened by such conduct.

It is perfectly true that before the Indictments Act, 1915, an indictment for affray would have alleged that what was done was to the great terror and disturbance of divers liege subjects, and since that Act the mere allegation of an affray imports terror and disturbance, but in our opinion this averment is no more than one which alleges that the circumstances involve a breach of the Sovereign's peace, that it was a real disturbance of the peace by two persons fighting each other in public instead of settling their differences in the Royal Courts, or endeavouring by a display of force, though without necessarily using actual violence, to overawe the public, which was what was aimed at by the Statute of Northampton. Indeed, we should have thought there could be no doubt on this matter were it not for the decision in *FIELD v. METROPOLITAN POLICE RECEIVER* [1907] 2 K.B. 853, where at p. 860, the Divisional Court laid down what were the necessary elements to constitute a riot, one of which was force or violence displayed so as to alarm at least one person of reasonable firmness and courage. From this it is deduced that evidence to that effect must be given, though not necessarily, we think, by calling a person to say: "I was terrified." It might be enough for a witness to say that persons appeared to be alarmed. Now it is true that affrays are usually classed along with unlawful assemblies, riots and routs as offences against the public peace, but we have only in this case to deal with an affray. The word "riot" is a term of art and, contrary to popular belief, a riot may involve no noise or disturbance of the neighbours, though there must be some force or violence. For instance, if three persons enter a shop and forcibly or by threats steal goods therein, technically they are guilty not only of larceny or robbery but also of riot—see *LONDON AND LANCASHIRE FIRE INSURANCE CO., LTD. v. BOLANDS, LTD.* [1924] A.C. 836. It may be that the fifth element referred to in *FIELD's* case (*supra*), may require reconsideration at some

future time, for, if disturbances such as necessitated the passing of the Public Order Act, 1936, should occur again, or if there were a repetition of the Trafalgar Square riots which took place towards the end of the last century when most of the club windows in Pall Mall were smashed by an angry mob, it would seem superfluous if someone had to go into the witness box and say that he or some passers-by felt or appeared afraid or apprehensive. We need give no final decision on this point so far as riots are concerned, but, in our opinion, there was in the present case evidence on which the jury could find that the appellants were guilty of an affray and on that matter the Recorder's direction was right.

We must now turn to the second ground of appeal. It will be remembered that the appellant Sharp contended that he only acted in self-defence after he had been set upon by the other appellant and, apparently, attempted to excuse the use of a razor because he was handicapped by his crippled condition. Johnson also seems to have endeavoured to justify his conduct in biting off his opponent's ear by the fact that he was attacked with a razor. Now, as the Recorder said, and we see no reason why he should not, one object in charging the appellants with an affray, which is of necessity a joint offence, is that in this class of case each prisoner throws the blame on the other and there is a danger that, perhaps being disgusted with both and thinking each only got his deserts, a jury will acquit both if the charges are of one wounding the other. The Recorder directed the jury that it did not matter who started the fight or who was to blame and that in the present case no question of self-defence arose. Indeed, he said more than once and with emphasis that self-defence for the purpose of this case was quite immaterial. In our opinion, this goes too far. If two men are found fighting in a street, one must be able to say the other attacked him and he was only defending himself. If he was only defending himself and not attacking, that is not a fight and, consequently, not an affray. A man may well defend himself and then pass to the attack, which is very likely what happened here, or in

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repelling an attack he may use more than necessary force, and again that may be the case here as a razor was used. But it appears to us inescapable that this raised questions for the jury. Sharp's case was that he was attacked by Johnson and that, as a partial cripple, he used the razor to protect himself. The jury might well have rejected this as extravagant, but we do not feel able to say they must have done so on a proper direction. The facts are such that the court is strongly inclined to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, but we think on the whole that, were we to do so, we should be going further than we ought, and it is obvious that one cannot be convicted and the other acquitted. We reluctantly, therefore, quash the convictions.

But we have still a power that we think should be exercised in this case, a power to exercise what is called preventive justice. Both these young men have shown themselves to be violent and aggressive and as such to be blemishers of the peace. We, as Her Majesty's judges, are also justices of the peace for every county and we propose therefore to exercise the powers given by the Justice of the Peace Act, 1360, 34 Edw. 3, c. 1, and which have been confirmed by the well-known decisions in *WISE v. DUNNING* [1902] 1 K.B. 167, and *LANSBURY v. RILEY* [1914] 3 K.B. 229. We order each of them to enter into a recognisance and to give a surety in the sum of £50 to keep the peace and be of good behaviour for twelve months, and, in default, to go to prison for six months.

Convictions quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE GORMAN AND
MR. JUSTICE HINCHCLIFFE

GERALD TOLWYN GARDINER

1957
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Sentence—Borstal Training—Youth with Homosexual Tendencies.

A sentence of Borstal training is suitable for a youth convicted of a homosexual offence, if the other circumstances of the case render such a sentence appropriate.

Appeal against sentence.

The appellant was convicted at Bristol Assizes on November 12, 1956, of gross indecency with another male person, and was sentenced by Havers J. to Borstal training, two similar offences being taken into consideration.

The appellant in person.

No counsel appeared for the Crown.

CASSELS J. : The appellant was convicted with two other persons and in his appeal to the court to alter his sentence he has drawn attention to what he believes to be the fact that the other two persons were placed on probation. That is not correct, as in fact one of the others was sentenced to twelve months' imprisonment. What exercised the mind of the court in granting the appellant leave to appeal was the question whether Borstal training is an appropriate sentence in the case of offences of this kind. The information which has been obtained on this point shows that there is no real objection to an order of Borstal training being made in the case of a young man who has either pleaded Guilty to or been convicted of homosexuality. As the Prison Commissioners say that perfectly suitable training is available in a Borstal institution for such as the appellant, the court sees no reason to alter

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the sentence. In the circumstances of the case, in spite of the facts that the appellant has not been before a court before and that he comes from a good home, the court has come to the conclusion that the order of Borstal training made in this case was a proper one. The appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE GORMAN

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CHRISTOPHER JOSEPH WILLIAMS
EDWARD BELL

Report by Judge—Allegations against Police by Prisoner—Inquiries Made after Trial—Report Embodying Results of Inquiries—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 8.

During the course of a trial a prisoner made certain allegations against the police. After the conclusion of the trial the Recorder who had tried the case directed a detective-sergeant to make further inquiries on this matter, and forwarded to the Court of Criminal Appeal a long and detailed report by the detective-sergeant, accompanied by observations, on the allegations which had been made.

Held, that it was undesirable that any judge before whom a case had been tried should go out of his way to make further inquiries after the trial; that a report of this kind was unnecessary and of no assistance to the court; and that the practice ought not to be repeated.

Applications for leave to appeal, in the case of one appellant, against sentence and, in the case of the other appellant, against conviction and sentence.

At Liverpool Crown Court on December 10, 1956, the applicant Bell pleaded Guilty to, and the applicant Williams was convicted of, robbery with aggravation. Bell was sentenced

by the Recorder of Liverpool (Neville Laski, Esq., Q.C.) to 'three years' and Williams to five years' imprisonment.

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No counsel appeared.

THE LORD CHIEF JUSTICE: The court is going to refuse leave to appeal in this case but desires to make one or two observations.

The learned Recorder, before whom the case was tried, has seen fit to send to the court a detective-sergeant's report as the result of inquiries which have been made subsequent to the trial in respect of certain allegations made by one of the applicants against the police. This court sometimes asks for a special report, and sometimes the Home Office does so, but we think it is undesirable that a Recorder or judge or anybody else before whom a case has been tried should go out of his way to make further inquiries, because this court has to come to a decision on the evidence which was given actually before the court of trial and on what took place at that court. In this particular case a very long and detailed report has been made and observations put forward upon the allegations which one of the applicants made. Such a report is quite unnecessary and of no assistance to this court, and we desire that the practice should not be repeated.

Applications refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
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SYDNEY WALL

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Sentence—Postponement for Twelve Months—Disapproved by Court.

As a suspended sentence is not known in England, though it may be proper for a court to postpone sentence for a short

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period in order that further inquiries can be made, postponement for twelve months is not a proper course.

Appeal against sentence.

The appellant and his son-in-law, Maurice Rowlands, pleaded Guilty at Lancashire Quarter Sessions on January 16, 1957, to two offences of housebreaking, and the appellant was sentenced by the Deputy-Chairman to nine years' preventive detention. In the case of Rowlands sentence was postponed for twelve months.

No counsel appeared.

THE LORD CHIEF JUSTICE [after stating that, in the opinion of the court, there was no ground for interfering with the sentence passed on the appellant]: In the case of Rowlands the court said that they took the view that he was under the influence of his father-in-law and added: "We are going to try a course with you to which we hope you will respond. We are postponing sentence on you for twelve calendar months. If you commit an offence during that twelve months, then, of course, you will be dealt with for it and you will be brought here and we shall deal with you; but if, at the end of that time, there is a good report about you, then I can assure you this court will take such a course that you will be able to get back a decent character." The indictment was indorsed "Judgment postponed County Quarter Sessions to be held at Liverpool on the — day of January, 1957." That is a mistake, because obviously 1957 ought to be 1958.

This court desires to say that they do not approve of postponing a sentence for twelve months. This matter has been considered by the court on two or three occasions and some of the difficulties have been pointed out. In this case I should think what quarter sessions meant to do, and what they certainly might have done, was to give a conditional discharge, because under section 7 of the Criminal Justice Act, 1948, a conditional discharge operates for twelve months, that is to say, if the

offender commits no further offence during the twelve months, he is free of the charge and the conviction cannot be used against him in the future as a previous conviction, while if he commits any offence during the twelve months, he can be brought back. In this case the accused has not been conditionally discharged; he has been let out not on bail or on his own recognisances, and the matter is, so to speak, in the air. In London, at the Central Criminal Court, the County of London Sessions and the Middlesex Sessions, and, indeed, at quarter sessions like Liverpool Quarter Sessions, it is not uncommon for sentence to be postponed until the next sessions in order that further inquiries can be made to enable the court to decide how they will deal with the offender, but we cannot approve of quarter sessions postponing sentence for twelve months. The suspended sentence is not yet known in this country and, a provision having been made in section 7 of the Criminal Justice Act, 1948, for a conditional discharge which operates for twelve months, that order ought to be made or the offender ought to be bound over to come up for judgment if called upon within a definite period, or put on probation.

We cannot alter the sentence, because this defendant has not appealed, but we desire to say that we do not think it is desirable for a postponed sentence of this sort to be passed, and that the court ought to make up its mind whether to order a conditional discharge, a binding over or a placing on probation. This defendant will be out till quarter sessions in January, 1958, when apparently he will have to appear. He is not on bail or under any recognisance to appear, and it does not seem at all a satisfactory state of affairs, and we hope it will not occur again. The indictment will be sent back to the Clerk of the Peace and his attention will be called to it.

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Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
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HARRY LAZARUS LOBELL

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March 4, 11*Self-Defence—Burden of Proof—Direction to Jury.*

Where a defence of self-defence is raised, the burden rests on the prosecution of negating that defence, but the prosecution are not obliged to give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or indeed to give any evidence on that issue at all. The jury may conveniently be directed that the burden of establishing guilt rests on the prosecution, but that they must also consider any evidence (which ordinarily will be evidence from the defence) relating to self-defence, and if that evidence either convinces them of the innocence of the accused or causes them to doubt whether he may have been acting in self-defence, he is entitled to be acquitted.

SMITH (1837) 8 C. & P. 160 not followed on this point.

Appeal against conviction.

The appellant was convicted at Manchester Crown Court on December 12, 1956, of wounding with intent and was sentenced by Jones J. to four years' imprisonment.

There was considerable enmity between the appellant and the wounded man Evans, and there was evidence of threats which had been uttered by Evans against the appellant. On the day of the wounding it was alleged that Evans had approached the appellant uttering threats, and that the appellant then threw a brick at Evans, who continued to advance towards him in a threatening manner; and that the appellant then picked up a knife, which he said he brought for his protection, and stabbed Evans. The appellant then drove off to a police station and told the police that he had stabbed a man in self-defence.

At the trial the appellant relied on the defence of self-defence and Jones J. directed the jury that it was for the defence to establish to their satisfaction the plea of self-defence.

J. R. D. Crichton, Q.C. (*I. R. Taylor* with him), for the appellant.

The direction of Jones J. with regard to burden of proof amounted to a misdirection. He definitely told the jury that the burden of proving self-defence was on the defence, relying, no doubt, on the passage in *Archbold*, 33rd ed., p. 942, which sets out with approval the direction of Bosanquet J. in *SMITH* (1837) 8 C. & P. 160. This may at one time have been a correct statement of the law, but it has ceased to be so since the decisions of the House of Lords in *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS*, 25 Cr.App.R. 72; [1935] A.C. 462 and *MANCINI v. DIRECTOR OF PUBLIC PROSECUTIONS*, 28 Cr.App.R. 65; [1942] A.C. 1; where it was made clear that the burden of establishing a defence is placed on the defence only in the case of insanity and under certain specific statutory provisions. Further, in *CHAN KAU v. R.* [1955] A.C. 206, Lord Tucker said that the statement of the law set out in the passage in *Archbold* already referred to "clearly needed some modification in the light of modern decisions." Secondly, if the judge was right in directing the jury that the burden of establishing self-defence was on the defence, he should have told them that such a burden is less onerous than that placed on the prosecution and establishing guilt, and this he omitted to do. [He referred to *CARR-BRIANT*, 29 Cr.App.R. 76; [1943] K.B. 607.]

Sir Noel Goldie, Q.C. (*Donald Summerfield* with him), for the Crown.

It is conceded that Jones J. did direct the jury that the burden of establishing self-defence was on the defence and that he followed the directions in *SMITH* (*supra*), which certainly for many years was accepted as good law. In some sense the burden must, in effect, be on the defence, because it is difficult to see how the defence could be established

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without the accused calling some evidence. It would, no doubt, have been more satisfactory if the judge had specifically told the jury that the burden of the defence was less heavy than that which rests on the prosecution of proving guilt, but the summing-up very carefully reviewed the evidence and dealt with the arguments of both sides, so that the jury were able to appreciate the issues involved.

At the conclusion of the arguments the Lord Chief Justice stated that the appeal would be allowed and the conviction quashed, and that the court would give reasons for its decision at a later date.

Cur. adv. vult.

Mar. 11. The judgment of the court was read by

THE LORD CHIEF JUSTICE: The appellant was convicted before Jones J. at the Manchester Crown Court of wounding with intent and sentenced to four years' imprisonment. At the trial the sole defence set up by the appellant was that in inflicting the wound he was acting in self-defence. This appeal is brought on the grounds that the direction of the learned judge that the burden of proving this defence was on the accused was erroneous, and also that he did not direct the jury that the degree of proof required from the defence was less than that required from the prosecution. It is unnecessary to state the facts in any detail, as the whole appeal is concerned with the direction as to the burden of proof; it is enough to say that there was considerable enmity between the wounded man, one Evans, and the appellant, who was a butcher with a stall in the meat market. There was evidence of threats which had been uttered by Evans against the appellant. The appellant had on a previous occasion with a knife in his hand said he would kill Evans, who had retorted that, if the appellant moved his arm, he would break it. On the day of the wounding alleged in the indictment it was said that Evans approached the appellant uttering threats, that the latter then threw a brick at Evans, who, however, continued

to advance towards him in a threatening manner, whereupon he picked up a knife which, he said, he had brought for his protection and stabbed him. The appellant then drove off to the police station and said that he had stabbed a man in self-defence.

Now it is unnecessary to set out verbatim the passages in the learned judge's full and careful summing-up which have been criticised by counsel for the appellant because there is no doubt, and the prosecution has not contended otherwise, that he directed the jury that it was for the defendant to establish to their satisfaction his plea of self-defence. The onus was clearly put in the summing-up on the defendant. There is no doubt that in so doing the learned judge had the support of SMITH (1837) 8 C. & P. 160, where Bosanquet J., apparently with the approval of Bolland B. and Coltman J., charged the jury that, before a person can avail himself of this defence, he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. In that case the learned judge said that the accused would be justified. He no doubt had in mind the provisions of the Offences against the Person Act, 1828 (9 Geo. 4, c. 31), s. 10, now replaced and re-enacted by section 7 of the Offences against the Person Act, 1861, which enacts that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. This passage from the summing-up has for many years appeared in *Archbold* (see 33rd ed., p. 942) as the proper direction to be given in such cases and certainly puts the onus of establishing a defence of killing *se defendendo* on the accused. It is a defence of justification, or, to put it in terms of pleading, a confession and avoidance. In civil cases this plea is always to be proved by the party setting it up; and it is perhaps not altogether easy to see why it should not be so in a criminal case, more especially as, when self-defence is set up, the facts

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must often be known only to the defendant who relies upon it. But in the opinion of the court the cases of *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS*, 25 Cr.App.R. 72; [1935] A.C. 462, and *MANCINI v. DIRECTOR OF PUBLIC PROSECUTIONS*, 28 Cr.App.R. 65; [1942] A.C. 1, establish that in murder or manslaughter the rule that the onus is on the prosecution permits of no exception except as to proof of insanity. In the recent case of *CHAN KAU v. R.* [1955] A.C. 206, this was stated in terms by Lord Tucker, who at p. 211 referred to *SMITH (supra)* and said that the passage from the summing-up quoted in *Archbold* clearly needed some modification in the light of modern decisions. It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or indeed need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury, there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be Not Guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence, which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but none the less the

onus remains on the prosecution; what it really amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdict should be Not Guilty, and this is as true of an issue as to self-defence, as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence. Had the learned judge in the present case gone on to say that it was not for the accused to establish his plea with the same degree of certainty as is necessary to establish a case for the prosecution, it might have been that we should have had to consider whether this was a case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907. There was certainly here material on which a jury might have found self-defence. But that it was the duty of the accused to satisfy them on this point was on several occasions stressed in the summing-up and we do not feel by any means satisfied that, if what we now hold was the correct direction had been given, the jury would be sure to have convicted. For these reasons we quashed the conviction at the close of the argument.

Conviction quashed.

Solicitors: A. E. M. West, Manchester, for the appellant; Sharpe, Pritchard & Co., agents for P. B. Dingle, Town Clerk, Manchester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE GORMAN

EDWARD ERNEST BOULDEN

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Children and Young Persons—Abandonment—Neglect—Children and Young Persons Act, 1933 (23 & 24 Geo. 5, c. 12), s. 1 (1).

The appellant was the father of five young children aged between nine and one. As the result of a quarrel between her and the appellant, the appellant's wife left the house in which

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they had been living with the children and in which the children were about 3 p.m. and informed the husband that she was returning to her parents in Scotland. About 9 p.m. the same day the appellant telephoned to the headquarters of the National Society for Prevention of Cruelty to Children and informed an officer of the society that his five children were alone in his house and asked the society to send someone to look after them. When the officer asked the appellant why he could not look after them himself, the appellant gave a false excuse. About 9.50 p.m. a policewoman arrived and found the house in darkness and the children alone in the house. There was only a small quantity of food in the house. Later the appellant followed his wife to Scotland. He gave conflicting accounts of his movements between the time when his wife left and when the policewoman arrived. The appellant was convicted on counts charging him with abandoning and with neglecting each of the children, contrary to section 1 (1) of the Children and Young Persons Act, 1933.

Held, that to "abandon" a child for the purposes of this subsection means to leave it to his fate, and that there was evidence on which the jury were entitled to find charges both of abandonment and neglect proved in respect of each of the children.

Dictum of Lord Dunedin in *MITCHELL v. WRIGHT* (1905) Ct. of Sess. 568, at p. 574 approved.

Appeal against conviction.

The appellant was convicted at Middlesex Quarter Sessions on January 15, 1957, of abandonment and neglect of his children, contrary to section 1 (1) of the Children and Young Persons Act, 1933, and was sentenced by the Chairman (The Hon. E. E. S. Montagu, Q.C.) to concurrent terms of six months' imprisonment.

The indictment contained ten counts. There was a count charging abandonment of each of five children, and also a count charging neglect of each child. The eldest child was a girl of nine and the youngest a baby of one year old. The appellant had followed his wife from London to Glasgow, where she had temporarily returned to her relatives. Before leaving, he had telephoned the headquarters of the National Society for the Prevention of Cruelty to Children, and told an officer of that society that his five children were alone in his home,

and asked the society to send someone to look after them. When he was asked: "Why not look after them yourself?" he said that there was a court order which ordered him not to go near his wife and that he had seen her take a train for Scotland. No such order was in fact in existence. The headquarters of the society got in touch with the police and a policewoman was sent to the house, where she found the house in darkness and the five children alone. She then took them to the police station. The appellant said in evidence that he watched the arrival of the policewoman from the other side of the street and that, had he not seen her take the children away, he would have returned to the house himself. The only food in the house seen by the policewoman was two loaves, two pints of milk, some tomatoes, some macaroni, one egg and a packet of cereal.

The Chairman directed the jury that, so far as the five counts relating to abandonment were concerned, the same considerations applied to all the children and that, if the jury were satisfied that the appellant had placed the children in the care of a welfare society before he could be said to have left them, there had been no abandonment. On the counts relating to neglect he referred to SENIOR [1899] 1 Q.B. 283, at p. 291 and stated that facts which might be adequate to constitute neglect of the younger children might not constitute neglect of the elder children.

Quintin Iwi, for the appellant.

The verdict of the jury in finding the appellant guilty both of neglect and abandonment of the children was inconsistent. There was no evidence of abandonment, inasmuch as the appellant, before he left, had taken steps to see that the children would pass into the care of a responsible authority. Even if the question whether the appellant actually watched the policewoman arrive at the house is left in doubt, there is no doubt about the telephone message having been received at the headquarters of the Society for Prevention of Cruelty to Children. The case is,

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therefore, analogous to WHIBLEY (1938) 26 Cr.App.R. 184, where children were alleged to have been abandoned in a juvenile court. Further, there was no sufficient evidence of neglect, particularly in the case of the elder children. The evidence at the most established that they may have been a little frightened or a little hungry, and according to the decision in WHIBLEY (*supra*) that is not sufficient to establish the charge. It is clear from their indiscriminate verdict that the appellant was guilty on all counts that the jury did not appreciate what the prosecution had to prove to establish the respective charges.

J. S. R. Abdela, for the Crown.

The ingredients of the offences of abandonment and neglect were very clearly explained to the jury in a summing-up, which was certainly not unfavourable to the appellant. The questions were essentially questions of fact for the jury, and there was evidence to support their finding on each count. In view of the number of inconsistencies in the various accounts of his conduct given by the appellant, the jury may well have attached little weight to his evidence.

GORMAN J.: The appellant, Edward Ernest Boulden, was convicted at the Middlesex Sessions on January 15, 1957, of charges laid under the Children and Young Persons Act, 1933. There were five children involved, and in respect of each child there were two charges brought. The first charge alleged against the appellant that "between November 17 and 23, 1956, being a person who had attained the age of sixteen years, having the custody, charge or care of Valerie Boulden, a child of the age of nine years, he wilfully abandoned her in a manner likely to cause her unnecessary suffering or injury to health." The second charge in respect of the same child was that between the same dates he wilfully neglected that child in a manner likely to cause her unnecessary suffering or injury to health. The jury, after a summing-up by the learned Chairman of the Sessions, found the appellant guilty of each of those ten charges.

The court is very much indebted to Mr. Iwi for the manner in which he has put the case on behalf of the appellant. The case was a particularly unfortunate one. There had been a quarrel between husband and wife and as a result of that quarrel the wife went up to Scotland in order, as she said, to get some assistance from her family there for the support of the children. She made other allegations against the appellant, and substantially they were that he was failing in his duty as a husband and father to look after these children. There were many quarrels and about 3 p.m. on November 17, 1956, she, having as she said, told her husband for what she was going to Scotland, went away, and took the night train to Glasgow. Apparently about 9 p.m. the same day a telephone message was received by the headquarters of the National Society for the Prevention of Cruelty to Children, and it was said in evidence that the appellant said to an officer of that society: "My five children are alone in my home, will you send somebody to look after them," and he was told: "Why not look after them yourself?" Then he said something which was clearly untrue. He said: "There is a court order which states that I must not go near my wife and I have seen her get on a train for Scotland this evening." There was in fact no such court order in existence. The officer at the headquarters of the National Society for the Prevention of Cruelty to Children tried to get in touch with the local officer. That failed and eventually he spoke to the Feltham Police Station, and a policewoman was sent to the home of these children about 9.50 at night. She arrived there, found the house in darkness and the five children, aged from nine to one, alone in the house. She took the children to the police station. The appellant followed his wife to Glasgow, taking the night train on November 18, and was eventually taken into custody in Scotland.

The appellant first of all made a statement, in which he said that after his wife left at three o'clock on November 17, he stayed with the children till after 9.30, then telephoned the police and watched them arrive and leave with the children.

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His case was that he was there to see that the children were in the custody of someone, a police officer, before he went away. The story told by the appellant may very well in the circumstances of this case not have appealed to the jury. There were many inconsistencies in what he said on various occasions, and it may very well be that the jury did not believe him, but that they did in fact take the view that here was a man who, having quarrelled with his wife, decided in his own mind to say: "I wash my hands of the children and I will clear off to Scotland."

The question of what is meant by "abandon" was referred to by the Lord President (Lord Dunedin) under another Act in the case of *MITCHELL v. WRIGHT* (1905) Ct. of Sess. 568, when he said (at p. 574): "I think that the words 'abandoned or deserted the child' [in section 1 of the Children Act, 1891] point at the parent leaving the child to its fate." This court is of no doubt that in all the circumstances of this case the jury might well have come to the conclusion that the appellant's intention was to clear out, to leave these children to their fate and to wipe his hands clear of them. There was evidence upon which they could so find and, that being the case, this court does not intend to interfere. It has been said by Mr. Iwi that there is perhaps a little incongruity in the finding of the jury that the appellant was guilty both of abandoning and of neglect. The court comes to the view that those are matters of degree. There was evidence upon which they could find both. There is nothing incongruous in finding both, and the court does not intend to interfere with the findings of the jury on any of these ten charges. This appeal must be dismissed.

Appeal dismissed.

Solicitors: Durham & Co., for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STABLE,
MR. JUSTICE CASSELS, MR. JUSTICE GORMAN AND
MR. JUSTICE HINCHCLIFFE

JAMES EDWARD HALLAM

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*Explosive Substance—Burden of Proof—Knowledge on Part of
Prisoner Necessary to be Proved—Explosive Substances Act,
1883 (46 & 47 Vict. c. 3), s. 4 (1).*

By section 4 (1) of the Explosive Substances Act, 1883:
“Any person who . . . knowingly has in his possession or
under his control any explosive substance, under such circum-
stances as to give rise to a reasonable suspicion that he . . .
does not have it in his possession or under his control for a
lawful object, shall, unless he can show that he . . . had it in
his possession or under his control for a lawful object, be guilty
of felony. . . .”

In order to establish this charge, the prosecution must prove
(i) that the prisoner knew that he had the substance in his
possession or under his control and also (ii) that he knew it
was an explosive substance; but once the prosecution have
proved the first of the aforementioned ingredients and have
also proved that the circumstances were such as to give rise
to a reasonable suspicion that the prisoner did not have the
substance in his possession or under his control for a lawful
object, a jury may easily infer the second ingredient.

DACEY (1939) 27 Cr.App.R. 86 not followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court
on December 6, 1956, of knowingly having in his possession or
under his control explosive substances, namely fifteen pieces
of gelignite and thirty-four detonators, under such circum-
stances as to give rise to a reasonable suspicion that they were
not in his possession or under his control for a lawful object,
contrary to section 4 (1) of the Explosive Substances Act, 1883,
and was sentenced by the Recorder of London to three years’
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It is unnecessary to set out the facts of the case, which is reported solely on the point of the proper direction to be given to the jury on burden of proof. The Recorder, following DACEY (1939) 27 Cr.App.R. 86, directed the jury that the prosecution had to prove that the appellant knew that he was in possession of the particular substance, but that it did not matter whether he knew that the substance which he had in his possession was an explosive substance.

The case came on for hearing on February 18, 1957, before a court composed of Cassels, Gorman and Hinchcliffe JJ. and was referred by them to a full court of five judges.

Gerald Gardiner, Q.C. (Brendan J. Shaw with him) for the appellant.

The Recorder based his direction to the jury in this case on the decision in DACEY (*supra*), but it is submitted that that direction was wrong and that, in view of the language of section 4 (1) of the Act of 1883 the prosecution are required to prove not merely that the accused knew that he was in possession of the particular substance, but also that he was in possession of something which he knew to be an explosive substance. That was actually the direction which Cassels J. gave at the trial in DACEY (*supra*) and, in so far as the judgment of the Court of Criminal Appeal adopted a narrower interpretation of the Act, the judgment was *obiter* and should not be followed. The word "knowingly" in a criminal statute embraces all the elements of the *actus reus*: GAUMONT BRITISH DISTRIBUTORS v. HENRY [1939] 2 K.B. 711; GROOM v. GRIMES (1909) 89 L.T. 129; COHEN, 34 Cr.App.R. 239; [1951] 1 K.B. 505; BROOKS v. MASON [1902] 2 K.B. 473. If the submission that there was a substantial misdirection in law in this case is correct, then the convictions should be quashed, for it is not the practice of this court to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, where there has been a misdirection on burden of proof.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *J. H. Buzzard*, for the Crown.

It is conceded that the Recorder in this case based his summing-up on the decision of this court in *DACEY* (*supra*) and it is also clear that the judgment of this court, in so far as it laid down that that is the proper direction on a charge under section 4 (1) of the Act of 1883, was *obiter*; but an examination of the wording of the subsection shows that the Crown does not have to prove knowledge on the part of the prisoner that the substance was explosive. The subsection creates two offences (a) making and (b) possessing or controlling an explosive substance and “knowingly” is an ingredient of (b). This view is fortified by an examination of the wording of section 9, where the definition of “explosive substance” is in the widest terms. Even if the direction of the Recorder had been such as the appellant contends that it should have been, no reasonable jury could on the evidence have come to any different conclusion, and the court is, therefore, invited to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: The appellant was convicted before the Recorder of London on an indictment preferred under the Explosive Substances Act, 1883, which charged him that he “knowingly had in his possession or under his control certain explosive substances, to wit, fifteen pieces of gelignite and thirty-four detonators under such circumstances as to give rise to a reasonable suspicion that they were not in his possession or under his control for a lawful object.” The Recorder passed a sentence, which, in the circumstances, must certainly be regarded as a lenient one, of three years’ imprisonment.

The appeal has been heard by a full court because of a judgment of the court in the year 1939 in *DACEY*, 27 Cr.App.R. 86. The point that is raised is purely a matter of construction of section 4 (1) of the Explosive Substances Act, 1883, which is in these terms: “Any person who . . . knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable

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suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object be guilty of felony. . . .”

The whole question in the case is whether the word “knowingly” means that the accused must know not only that he has a parcel or a substance in his possession, but also that it is an explosive. The words, I repeat, are “knowingly has in his possession any explosive substance.” Having given the best consideration that we can to this case, we think that the words must mean that the accused must know that it is an explosive substance. The difficulty caused by the case of DACEY (*supra*) is that my brother Cassels directed the jury in these words: “What you have to be satisfied upon is, did he knowingly have these things in his possession, he knowing that they were explosive substances?” In spite of some confusion which seems to have existed as to what Cassels J. meant, Cassels J. who is a member of this court, says that that is what he said and what he meant to say. The Court of Criminal Appeal in that case upheld the conviction and refused the application for leave to appeal. It was a case which was not argued and counsel did not appear on either side; the court simply refused to give leave. The Solicitor-General, who has appeared for the prosecution in this case, has not contended that this court is bound by the judgment in that case because it was to a great extent *obiter*. What the court decided in that case was that it was sufficient to show that the accused had in his possession something which proved to be an explosive substance, provided also that there was some evidence of suspicious circumstances from which a jury could draw the inference that he did not have it in his possession for a lawful purpose. Of course, there is an onus thrown upon him, if there is a suspicious circumstance proved, of showing that it was in his possession for a lawful purpose.

The Recorder, no doubt relying on this case, did direct the jury that it did not matter whether the prisoner knew that the substance which he had in his possession was an explosive.

The Recorder, we think, in so directing the jury was applying DACEY's case (*supra*) because that really was what DACEY's case (*supra*) decided, but, with all respect to that case, this court cannot take that view. We think that the clear meaning of the section is that the accused must not only knowingly have in his possession the substance, but must also know that it is an explosive substance. The section says he must knowingly have in his possession an explosive substance; therefore, it does seem that it is an ingredient in the offence that he knew it was an explosive substance. If evidence is given that the accused had the substance in his possession, and some evidence is given of circumstances which give rise to a reasonable suspicion that he had not got it for a lawful purpose, the jury are then entitled to infer that he knew it was an explosive substance. We think the proper direction to give to a jury on this charge is that they must first of all be satisfied that the accused had the substance in his possession. Secondly, they must be satisfied that it was in his possession under circumstances such as to give rise to a reasonable suspicion that he had it in his possession not for a lawful object. If they are satisfied of that, then they can infer that the accused knew it was an explosive substance. It is not necessary, of course, to show that he had any particular chemical knowledge. What he had in his possession may be gelignite, dynamite or gunpowder, but if he had it in his possession under such circumstances as to give rise to a suspicion that he had it for something other than a lawful object, it is only a short step then for the jury, taking into account all the circumstances, to decide that he knew quite well that it was an explosive substance and that he had it in his possession for an unlawful purpose. If the argument which found favour in DACEY's case (*supra*) really takes the word "knowingly" out of the section, it would simply mean that any person who has in his possession an explosive substance under such circumstances as to give rise to a reasonable suspicion, does not have it in his possession for a lawful object unless he can show he has it in his possession for a lawful object, and is guilty of felony. We

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EDWARD
HALLAM

Goddard
L.C.J.,
Stable J.,
Cassels J.,
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Hinchcliffe J.

think the ordinary *prima facie* construction of the section is that the accused must knowingly have in his possession an explosive substance and that must mean that he knows he has a substance which is in fact explosive and, as I say, that can be inferred perfectly well from the facts of the case. We think, therefore, that there was a misdirection by the learned Recorder but, after all, the right direction would be: "If you come to the conclusion that this man had this in his possession under circumstances which give rise to reasonable suspicion and he has not satisfied you that he had it for a lawful purpose, you can infer, if you choose, that he knew what this stuff was which he had in his possession." When it is found that the appellant had in his possession fifteen pieces of gelignite and thirty-four detonators, it is impossible to believe that he did not know quite well he had explosives in his possession, more especially from one very significant piece of evidence which he gave when he went into the witness-box. Having said that he had thrown the parcel behind the hedge, he said: "I went and took it from the hedge to the taxi in case children might touch it." The story which the appellant told of how he came into possession of this stuff and what he did with it was a story which no jury, I should have thought, in any circumstances would believe. Accordingly, although we decide the point of law in the appellant's favour, and though we differ from the decision in *DACEY (supra)* and give a different construction to the section, we have come to the conclusion that it is a case in which we should properly apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and therefore we dismiss the appeal.

Appeal dismissed.

Solicitors: Wilkinsons, for the appellant.

[CENTRAL CRIMINAL COURT CASE]

BEFORE

MR. JUSTICE PILCHER

R. v. THOMAS

1957
January 24

Prostitution—Living on Earnings of Prostitute—Room Let at Inflated Rent for Express Purpose of Prostitute Carrying on Trade—Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1 (1), s. 1 (3) as amended by Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), s. 7 (5).

A person who lets a room or flat at an inflated rent to a prostitute for the express purpose of her carrying on her trade there may be found guilty of living wholly or in part on the earnings of prostitution, contrary to section 1 (1) of the Vagrancy Act, 1898.

SILVER AND OTHERS (1956) 40 Cr.App.R. 32 dissented from on this point.

Trial before Pilcher J. and a jury.

The appellant was charged at the Central Criminal Court on January 24, 1957, with rape and also with living wholly or in part on the earnings of prostitution, contrary to section 1 (1) of the Vagrancy Act, 1898.

He pleaded Not Guilty to both charges.

Evidence was given by the prosecution that a woman aged twenty-one, who had some fifty-nine convictions for prostitution, entered into an arrangement with the defendant whereby she was to have the use of a room belonging to the defendant each night between 9 p.m. and 2 a.m. and was to pay the defendant £3 per night. The defendant knew that the woman was a prostitute and the purpose for which she intended to use the room. At the close of the case for the prosecution it was submitted on behalf of the defendant on the authority of SILVER AND OTHERS (1956) 40 Cr.App.R. 32 that the arrangement made by the defendant did not amount to living on the

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earnings of prostitution and that there was no case to go to the jury on this charge.

Victor Durand, for the prosecution.

H. S. Grannum, for the defendant.

PILCHER J.: In this case the accused is charged on one of the two charges against him, under section 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. Evidence was given on behalf of the prosecution from which the following facts emerged. These are not in dispute, because I have been told by counsel for the accused that he does not propose to call evidence. At the conclusion of the case for the prosecution, counsel for the accused made a submission to me that in the circumstances, in so far as the charge of knowingly living wholly or in part on the earnings of prostitution was concerned, I ought to direct the jury that, on the facts of this case, it was not open to them to find that the accused was knowingly living on the earnings of prostitution.

The undisputed facts are as follows. A prostitute now aged twenty-one, with some fifty-seven previous convictions for prostitution, made an arrangement with the accused that she should have the use of a room which he rented in a house in Bayswater, between certain hours, roughly, I think, between 9 p.m. in the evening and round about 2 a.m. in the morning. A certain amount of bargaining took place, and eventually the prostitute agreed to pay the accused £3 a night for the facilities which she enjoyed. He knew she was a prostitute, and knew that her purpose in securing the use of this room was to bring her clients there, and I think it is probably almost certain that he knew that she did a very satisfactory trade in this room. On her own evidence she was earning round about £80 to £90 a week from her professional activities.

Counsel for the accused, in support of his submission that I ought to direct the jury to acquit the accused, cited to me *R. v. SILVER AND OTHERS* (1956) 40 Cr.App.R. 32, which was

a decision of His Honour Judge Maude at this court in February, 1956. That was a case in which the defendants, Silver and others, were landlords and estate agents, who let, or were concerned with letting, flats at high rents, each flat to one prostitute, knowing that she was a prostitute, and that she intended to use the flat for the purpose of prostitution. They were accordingly charged under section 1 of the Vagrancy Act, 1898. The judge directed the jury to return a verdict of Not Guilty on this particular count. The jury returned that verdict and the defendants were discharged. The reasoning of the judge is set out at p. 37. "The question now arises, for the second time so far as is known, what the words 'knowingly lives wholly or in part on the earnings of prostitution' mean. It would seem, as I say, to anyone who did not give careful consideration to it, that anybody who received money earned by a prostitute would be committing an offence. For instance, the chemist who sells medicines and other things to a prostitute knowing that she is a prostitute would be in part living, in the broadest sense, on the earnings of prostitution; the doctor who attends her, the lawyer who appears for her, would appear to be committing an offence. That, of course, cannot be the intention of the Act. If in fact that were so, the state of the prostitute in this world would be simply appalling; she would be able to get no services, or would get them only with the utmost difficulty, and the same would apply to the food she wanted to buy. It is unthinkable. Therefore, one has to make up one's mind what the Act of 1898 really means. It has been said in argument before me by both sides that the doctor, for instance, who treats the prostitute knowing that she is a prostitute is not really living on her earnings, although of course the money that is handed over is her earnings; and that what he is, in fact, doing is living on his own earnings, because he has earned his money. The shopkeeper, the grocer and the baker and so forth, earn their money. The doctor gives his services, and the shopkeepers give their goods, in exchange for money. They are, in fact, earning their living,

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and they are not, therefore, knowingly living in part on the earnings of prostitution at all. But it is said now—and this seems to be the only instance to which I should direct my attention—that where a landlord lets his premises for the purposes of prostitution and gets what I propose to call ‘prostitute rent,’ a wholly different situation arises; that is to say, because the ordinary normal rent is less than the ‘prostitute rent,’ then, as far as the ‘prostitute rent’ addition is concerned, he is in fact living on the earnings of prostitution. I do not think that he is. I think that what the landlord is doing is living on his own earnings just like the shopkeeper. A shopkeeper who grossly overcharged a prostitute because she was a prostitute would, nevertheless, be living on his own earnings. Utterly, completely and disgustingly immoral though it might be, they would be his own earnings. The doctor earns his money, and so does the barrister, the landlord and the estate agent. They are living in part or wholly—although the professional man has, I suppose, other clients—on money that comes from a prostitute, but they are living on those moneys as the earnings of their own professions.”

With the greatest respect to the learned judge, I am sorry to say that I do not agree with that last passage which I have read. It seems to me that if there is evidence that the accused has let a room or a flat at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine, on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution. I take the view that anyone who acts in that fashion is acting, as it were, as a coadjutor of the prostitute, and is in quite a different position from the shopkeeper, doctor, or anyone else who performs services or sells goods in the ordinary way to a prostitute, and, this argument having been addressed to me in the absence of the jury, when the jury return I propose to direct them on the lines which I have indicated, and not in the fashion in which Judge Maude directed the jury in *R. v. SILVER AND OTHERS (supra)*.

[The jury returned a verdict of Guilty on both charges and the accused was sentenced to two years' imprisonment for the rape and twelve months' imprisonment on the charge of living on the earnings of prostitution.]

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Solicitors: The Solicitor, Metropolitan Police, for the prosecution; Nahra, Emerson, Naylor & Co., Wembley, for the defence.

On April 1, 1957, an application for leave to appeal was refused, and the court—The Lord Chief Justice, Mr. Justice Hilbery and Mr. Justice Stable—approved the ruling of Pilcher J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE STABLE

ANDREW BABATUNDE THOMAS

1957
Apr. 1

Prostitution—Living on Earnings of Prostitute—Room Let at Inflated Rent for Express Purpose of Prostitute Carrying on Trade—Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1 (1).

A person who lets a room or flat at an inflated rent to a prostitute for the express purpose of her carrying on her trade there may be found guilty of living wholly or in part on the earnings of prostitution, contrary to section 1 (1) of the Vagrancy Act, 1898.

SILVER AND OTHERS (1956) 40 Cr.App.R. 32; [1956] 1 W.L.R. 281 dissented from on this point.

Application for leave to appeal against conviction.

The applicant was convicted at the Central Criminal Court on January 24, 1957, of rape and of living wholly or in part on the earnings of prostitution and was sentenced by Pilcher J. to two years' imprisonment and one year's imprisonment (consecutive).

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Evidence was given by the prosecution that a woman aged twenty-one, who had some fifty-nine convictions for prostitution, entered into an arrangement with the applicant whereby she was to have the use of a room belonging to the applicant each night between 9 p.m. and 2 a.m. and was to pay the applicant £3 per night. The applicant knew that the woman was a prostitute and the purpose for which she intended to use the room. At the close of the case for the prosecution it was submitted on behalf of the defence on the authority of *SILVER AND OTHERS* (1956) 40 Cr.App.R. 32; [1956] 1 W.L.R. 281 that there was no case to answer. Pilcher J. overruled that submission (see *ante*, p. 117) and directed the jury that a person who let a room or a flat to a prostitute at an inflated rent for the express purpose of her carrying on her trade there might be found guilty of living wholly or in part on the earnings of prostitution.

No counsel appeared.

STABLE J. : This is an application for leave to appeal against conviction for, among other things, living on the immoral earnings of a prostitute. The learned judge, refusing to follow some observations in *SILVER AND OTHERS* (1956) 40 Cr.App.R. 32; [1956] 1 W.L.R. 281, directed the jury that if the accused was receiving a payment of £3 a night for allowing a prostitute to have the use of his bedroom for the purposes of carrying on her trade of prostitution in his room, the jury could find that he was living on the immoral earnings of that prostitute. In our judgment, the direction of the learned judge was right and the observations in the earlier case of *SILVER AND OTHERS* (*supra*), so far as they conflict with the direction of the learned judge in this case, were wrong. It was a perfectly plain case and there is no question about it that the applicant was living on immoral earnings. The application for leave to appeal is dismissed.

Application refused.

[CIRCUIT CASE (WELSH CIRCUIT)]

BEFORE

MR. JUSTICE BYRNE

R. v. BEYNON

1957
Apr. 3

*Plea—Fitness to Plead—Obligation to Try as Preliminary Issue—
No Right of Defence to Ask for Postponement to Trial of
General Issue.*

As an insane person cannot be tried, on the court being informed from any source that there is a preliminary issue whether the defendant is fit to plead to the indictment, it is the duty of the court forthwith to direct a jury to be empanelled to try that issue, and the court is not entitled to accede to a request by the defence that the general issue should be tried first.

ROBERTS, 37 Cr.App.R. 86; [1954] 2 Q.B. 329 not followed.

Trial on indictment.

The defendant, Henry Beynon, was charged at Glamorgan Assizes before Byrne J. on April 3, 1957, on an indictment (signed before the Homicide Act, 1957, came into force) alleging murder. On his arraignment and before plea pleaded, counsel for the Crown informed the judge that there was a preliminary issue whether the defendant was fit to plead and asked the judge to direct that that issue be tried forthwith.

Norman Richards, Q.C. (Bruce Isaac with him), for the defendant. The defence desire that the issue of fitness to plead be postponed until after the trial of the general issue. They are entitled to ask for this course to be taken, so that the defendant shall not be deprived of the possibility of being acquitted. This was done in ROBERTS, 37 Cr.App.R. 86; [1954] 2 Q.B. 329, where the defendant was a deaf mute. [He referred also to Halsbury's *Laws of England*, 3rd ed., Vol. 10, p. 402, para. 729.] For the purposes of section 2 of the Criminal

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Lunatics Act, 1800, there is no distinction between a deaf mute and a person incapable of following the proceedings for any other reason. The section is permissive and not mandatory and lays down the procedure to be followed in the normal case where the defence does not desire to raise the general issue. Natural justice requires that a defendant should be tried on the facts if his counsel so advises, and it is to be observed that a verdict of unfitness to plead cannot be reviewed by any court.

F. Elwyn Jones, Q.C. (Alun Davies with him), for the Crown. The issue of fitness to plead may be raised by the defence, by the prosecution or by the court of its own motion: DASHWOOD, 28 Cr.App.R. 167; [1943] K.B. 1. Quite apart from the Act of 1800, the whole weight of authority supports the proposition that a person who is unfit to plead cannot be tried while so unfit: Hale's *Pleas of the Crown*, Vol. I, p. 34; DYSON (1831) 7 C. & P. 305n; PRITCHARD (1836) 7 C. & P. 303; BERRY (1876) 1 Q.B.D. 447. ROBERTS (*supra*) appears to be the only case in which the contrary view has been taken, and may possibly be distinguished on the ground that there the defendant was found mute by the visitation of God. Further, Devlin J.'s attention does not appear to have been drawn to the Act of 1800.

Norman Richards, Q.C. in reply. None of the authorities cited apply to the case where the defence specifically desires the general issue to be tried first. There is no distinction between the present case and ROBERTS (*supra*), which should be regarded as having been rightly decided.

BYRNE J. Before the plea was taken in this case, Mr. Elwyn Jones, for the Crown, drew my attention to the fact that there was a preliminary issue to try, namely, whether the defendant was insane so that he could not be tried on this indictment. Mr. Norman Richards objected to the empanelling of a jury to try that issue because, he said, unless the law compels the court to deal with the issue of insanity, then natural justice requires that the general issue should be tried. He referred me, as authority for the proposition that the general issue could

be tried before the issue of insanity, to ROBERTS, 37 Cr.App.R. 86; [1954] 2 Q.B. 329. That was a case which was tried in this court by Devlin J., where a man charged with murder was found to be mute by the visitation of God. The question then arose whether there should be a trial of the preliminary issue whether he was insane so that he could not be tried. Devlin J. came to the conclusion, on objection being raised by the defence to that course, that the general issue should be tried first of all. His attention, I feel, was not drawn to one or two matters to which my attention has been drawn by Mr. Elwyn Jones, but I would say, first of all, that, in the light of my experience both at the Bar and on the Bench, it sounds to me a novel proposition that the preliminary issue should not be tried.

As I have always understood the law and seen it administered, if the court is aware of the fact that there is a preliminary issue whether the person charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that that issue is tried, even though no application is made by the prosecution or by the defence. I find that that view is fortified by a judgment of the Court of Criminal Appeal (Humphreys, Hilbery and Tucker JJ.) in DASHWOOD, 28 Cr.App.R. 167; [1943] K.B. 1, in which Humphreys J., delivering the judgment of the court, said (28 Cr.App.R. at p. 170; [1943] K.B. at p. 4) "It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself. That matter was present to the minds of the appellant's counsel when he pleaded Not Guilty. It was open to them at that time, if they had so desired—indeed, it was their duty if they so thought—to invite the judge to do what he would have been bound to do, namely, direct that the issue of the appellant's ability to plead should be tried by a jury. That would have been done, and it should be known, if there is any person who is not aware of it, that the court acts in such a case on information conveyed to it from any quarter. It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical

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officer of the prison where the defendant has been confined.” That appears to me to be the plainest possible statement of the way in which this matter has always been dealt with by the courts.

In RIVETT (1950) 34 Cr.App.R. 87, on arraignment at Suffolk Assizes, the preliminary issue was tried on the application of counsel for the prosecution, and the jury found that the appellant was fit to plead. The trial could not take place at the Suffolk Assizes owing to lack of time, and was adjourned to the Norfolk Assizes, and, at the latter assizes, counsel for the defence applied for the preliminary issue to be retried and the judge acceded to that request, when, again, the jury found that the appellant was fit to plead. What was said in the Court of Criminal Appeal is, in my view, important, although it was *obiter*. The Lord Chief Justice (Lord Goddard), in giving the judgment of the court consisting of himself, Humphreys and Sellers JJ., said (at p. 90): “It is now necessary to refer to what happened at the trial, which, at any rate in one respect, was somewhat unusual. Counsel for the prosecution informed the judge when the prisoner was brought up at the Suffolk Assizes that he was instructed that there was a question as to the prisoner’s fitness to plead; this was a perfectly correct course for the prosecution to take, and a jury was accordingly sworn to try that issue.”

I know of no case which says that that is not the proper course to take, apart from ROBERTS (*supra*). But authority for the course which the prosecution invite me to take, namely, to direct the trial of the preliminary issue, goes back to the days of Hale, and I am very much indebted to Mr. Elwyn Jones for providing me with an extract from Hale’s *Pleas of the Crown* (Vol. I, p. 34), which reads as follows: “If a man in his sound memory commits a capital offence and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy (*sic*), but be remitted to prison until that incapacity be removed. The reason is that he cannot advisedly plead to the indictment.” The next authority which I think is of importance in considering this matter

is BERRY (1876) 1 Q.B.D. 447, in which Kelly C.B. said (at p. 451): "Further, I believe it to have been the law from the earliest times, that if it is found at the trial of a prisoner that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial, or order a verdict of Not Guilty." Then he went on: "The jury here have expressly found the prisoner incapable of understanding, and it needs no argument to show that, under such circumstances, he ought not to be convicted." Lush J. said: "I am of the same opinion if it appears at any time during the trial that the prisoner is of non-sane mind, the proper course is to stop the trial and direct him to be detained during the Queen's pleasure. On that I base my judgment. Such course was adopted in the present case. I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings." That case was tried in 1876. The Criminal Lunatics Act was passed in 1800. Mr. Norman Richards invites me to take the view that the Act is not mandatory. It is quite true to say, of course, that that Act does not say that a jury shall be empanelled and that the issue shall be tried whether a person is insane so that he cannot be tried, but, as I see it, it is a statute which can be said to be declaratory of the common law; certainly it is in conformity with the opinion expressed in Hale's *Pleas of the Crown*. Section 2 of the Criminal Lunatics Act, 1800, provides: "If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment . . . it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded. . . ." It is not without interest to observe that the section goes on: "if any person charged with any offence shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be

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insane, it shall be lawful for such court to order a jury to be impanelled to try the insanity of such person; and if the jury so impanelled shall find such person to be insane, it shall be lawful for such court to order such person to be kept in strict custody. . . .”

It appears to me that the law has always been that an insane person cannot be tried, and although it is with the most profound regret that I find myself in disagreement with Devlin J., nevertheless I cannot avoid it, and the conclusion I have arrived at is that, upon my attention being drawn to the fact that there is a preliminary issue, that issue is one which the court is obliged to try. That is based upon the fact, not only that there is provision for such procedure by the Criminal Lunatics Act, 1800, but that there is authority for that procedure going back as far as Hale.

For these reasons this objection fails and I order a jury to be empanelled to try the preliminary issue.

[The jury found that the defendant was unfit to plead, and Byrne J. directed that he be kept in strict custody until Her Majesty's Pleasure be known.]

Solicitors: Andrew, Thompson & Partners, Swansea, for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE STREATFEILD

JOHN WILLIAM PERFECT

1957
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Sentence — Supervision Order — Convictions “on at least Two Previous Occasions” — Appearances at Separate Courts of Quarter Sessions or Assize Necessary — Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 8 (5), s. 12 (1), s. 22 (1).

By section 22 (1) of the Criminal Justice Act, 1948: “Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . . the court, if it sentences him to a term of imprisonment of twelve months or more shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines” make a supervision order.

On August 25, 1952, the appellant was convicted of an offence and was placed on probation for two years. On August 23, 1954, he was sentenced by quarter sessions to twelve months’ imprisonment for a further offence committed during the period of probation and to a concurrent term of twelve months’ imprisonment in respect of the original offence in respect of which he had been placed on probation.

In February, 1957, the appellant appeared before quarter sessions for sentence in respect of an offence of unlawful wounding, having been committed for sentence by a magistrates’ court. Quarter sessions sentenced him to eighteen months’ imprisonment, and also made a supervision order under section 22 (1).

Held, that the words “at least two previous occasions” in the above subsection refer to two separate appearances each at a separate court of quarter sessions or assize; that, as the conviction in respect of which the probation order was made did not, by virtue of section 12 (1) of the Act, rank as a conviction until the appellant was sentenced in August, 1954, he had not been convicted on “two previous occasions” within the meaning of section 22 (1); and that the supervision order must, therefore, be quashed.

ROGERS (1953) 36 Cr.App.R. 203 applied.

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Where there is an appeal against sentence in a case which has been committed to quarter sessions for sentence under section 29 of the Magistrates' Courts Act, 1952, the committal order with the sentence endorsed thereon should be sent to the Court of Criminal Appeal for rectification in the event of sentence being altered, as is done in the case of an indictment.

Appeal against sentence.

The appellant was convicted at a magistrates' court of unlawful wounding and was committed for sentence, under section 29 of the Magistrates' Courts Act, 1952, to East Kent Quarter Sessions, where on February 2, 1957, he was sentenced to eighteen months' imprisonment and a supervision order under section 22 of the Criminal Justice Act, 1948, was made.

At quarter sessions the service of notices under section 23 of the Act was proved, and the appellant admitted that on August 25, 1952, he had at East Kent Quarter Sessions been convicted of larceny and placed on probation for two years, and that at East Kent Quarter Sessions on August 23, 1954, having committed a further offence of office breaking and larceny during the period of probation, he had been sentenced to twelve months' imprisonment in respect of the original offence and to a concurrent term of twelve months' imprisonment in respect of the offence of office breaking and larceny.

G. Davey for the appellant.

Dorothy Knight Dix for the Crown.

Cur. adv. vult.

Apr. 15. The judgment of the court was read by

THE LORD CHIEF JUSTICE: This appellant was convicted by a magistrates' court of unlawful wounding and committed for sentence to the East Kent Quarter Sessions, where on February 2, 1957, he was sentenced to eighteen months' imprisonment and an order was made under section 22 of the Criminal Justice Act, 1948. He applied for leave to appeal against sentence and was given leave only on the question whether such an order could be made in this case. The requisite notice was served on

him and at the hearing he admitted that on August 25, 1952, he was placed on probation for two years at the East Kent Quarter Sessions; that on August 23, 1954, in respect of the commission of a further offence during the period of probation he was sentenced by the said court in respect of the earlier offence to twelve months' imprisonment and that on the same day at the same court he was convicted of office breaking and sentenced to twelve months' imprisonment. Those two sentences were made to run concurrently. The question is whether on February 2, 1957, when he was sentenced for the present offence, he was a person who had been convicted "on at least two previous occasions" of offences for which he was sentenced to imprisonment. There were thus two separate convictions, the first in August, 1952, and the second in August, 1954, but the sentences were passed on the same day. Section 8, subsection (5), of the Criminal Justice Act, 1948, provides that, where it is proved to the satisfaction of the court by which a probation order was made that the probationer has been convicted and dealt with in respect of an offence committed during the probation period, the court may deal with him for the offence for which the order was made as if he had just been convicted by or before the court for that offence. Quarter sessions, therefore, had jurisdiction to deal with him in August, 1954, both for the offence committed in 1952 for which he was placed on probation and the subsequent offence in 1954. By section 12 (1) of the Act a conviction in respect of which an offender is placed on probation is not deemed to be a conviction for any purpose other than the purpose of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing provisions of the Act, provided however that where an offender who is not less than seventeen years of age at the time when he was placed on probation is subsequently sentenced for that offence this subsection does not apply. The effect of this section has been explained both in *HARRIS*, 34 Cr.App.R. 184; [1951] 1 K.B. 107, and *STOBART* (1951) 35 Cr.App.R. 125, and in the latter case it was emphasised how desirable it was to pass some sentence, even if a

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nominal one, where a probationer had broken the terms of his probation, so that the offence for which he had been dealt with in that manner would thereafter count as a conviction. Section 22, however, would seem to require not only convictions on two previous occasions but sentences of imprisonment on two previous occasions, for if on one of the previous convictions only a fine had been imposed the section would not apply. This court had to consider the words "previous occasions" in *ROGERS* (1953) 36 Cr.App.R. 203, a case relating to preventive detention. The Court there pointed out that the same construction must be given to these words in section 22 as in section 21 (1) and (2), which deal with the requirements for sentences of corrective training or preventive detention. It was held that separate occasions meant appearances at a separate court of quarter sessions or assize. The conviction for which a probation order was made did not rank as a conviction till the appellant was sentenced at the sessions in August, 1954, when he was also convicted of a subsequent offence. We think therefore that the reasoning in *ROGERS* (*supra*) applies to the present case and accordingly we quash the order under section 22.

We desire to add for the guidance of Clerks of the Peace that it would be convenient when there is an appeal against sentence in a case committed to quarter sessions under section 29 of the Magistrates' Courts Act, 1952, for the committal order with the sentence endorsed thereon to be sent to this court for rectification if the sentence is altered, just as is done in the case of an indictment.

Sentence varied.

Solicitor: The Prosecuting Solicitor, County Hall, Maidstone, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE STREATFEILD

RAYMOND BARRY BULL

1957
April 15

*Sentence—Serious Case of Indecent Assault—Youth not Previously
Convicted.*

Sentence of twelve months' imprisonment substituted for sentence of Borstal training in the case of a youth of nineteen of hitherto good character for a serious indecent assault on a married woman.

Appeal against sentence.

The appellant pleaded Guilty at Nottinghamshire (Adjourned) Quarter Sessions on February 18, 1957, to indecent assault and was sentenced by the Chairman (T. R. Fitzwalter Butler, Esq.) to Borstal training.

The appellant was aged 19, married, and hitherto of perfectly good character. The indecent assault, which was of a serious nature, was committed on a respectable married woman in a field at night.

B. J. Appleby for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant pleaded Guilty at the Nottinghamshire Quarter Sessions to indecent assault, and was sent to Borstal training. He is nineteen years of age, and I regret to say he is married; it is simply lamentable boys getting married at nineteen. What respect he has for his wife may be shown by the fact that, when he was coming home from a public house one night, a perfectly respectable married woman walked along in much the same direction as he did, and he tried to kiss her after they had walked a certain part of the way. Then he pushed her down, got on top of her and put his hands up her clothes, and this was at night. This is not a

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case for Borstal training. It is not the case of a boy who needs discipline because he has been dishonest; it is the case of a boy who needs punishment for outrageous conduct. He will go to prison for twelve months. The sentence will date from conviction because he got leave to appeal.

Sentence varied.

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THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

CAPEL FRANCIS PARKER

Dangerous Driving—Momentary Act of Negligence.

A momentary disregard of safety precautions or a momentary act of negligence on the part of the driver of a motor-vehicle may amount to dangerous driving.

Appeal against conviction.

The appellant was convicted at Lancaster Assizes on January 29, 1957, of causing death by dangerous driving, contrary to section 8 of the Road Traffic Act, 1956, and was ordered by Streatfeild J. to pay a fine of £50. During a busy time of day the appellant was driving along a main street in Blackburn when he came to a dangerous crossing. He crossed over against the lights, when they were showing red in his direction, and came into collision with a motor-bus, which had the right of way, as the lights were showing green in its favour. The rear end of the appellant's car was flung round and struck an old man, who was killed thereby.

W. G. Morris, for the appellant. The judge was wrong in directing the jury that a momentary disregard of safety precautions or a momentary act of negligence on the part of a

driver could amount to dangerous driving. Such conduct could constitute the offence of careless driving only.

Kenneth Burke, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: The appellant appeals on the ground that there was a misdirection by the learned judge. The misdirection complained of is that the learned judge explained to the jury that the momentary disregard of safety precautions or a momentary act of negligence could amount to dangerous driving. [His Lordship stated the facts as set out above and continued:] The questions for the jury were: was there evidence on which they could find that the appellant was driving dangerously, and was the death of the old man caused by dangerous driving? The jury came to the conclusion that it was. The question whether the appellant's driving was dangerous or not was essentially one for the jury. Mr. Morris properly put all the considerations which he could to the jury, contending that they ought not to convict his elderly client because he was momentarily negligent. The question was: did his conduct amount to dangerous driving? How it can be said that it did not amount to dangerous driving, it is difficult to see. In our opinion, the learned judge gave a perfectly proper direction. This court is not going to attempt to lay down what is or what is not dangerous driving; that is a matter for the jury who hear all the facts and then have to consider whether the accused person drove in a manner dangerous to the public, having regard to all the circumstances of the case. Mr. Morris has done all he could for his client, but this is a perfectly hopeless appeal and it is dismissed.

Appeal dismissed.

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BEFORE

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RAYMOND HEDGECOCK

Sentence—Imprisonment not to Follow Corrective Training.

A sentence of imprisonment to commence on the expiration of a sentence of corrective training already being served should not be passed. Where it becomes necessary to pass a further substantial sentence on a prisoner already undergoing a sentence of corrective training, *e.g.*, where a prisoner has escaped from a sentence of corrective training and committed another offence while he is at large, the proper course is to pass a sentence of imprisonment longer than the unexpired portion of the sentence of corrective training and to run concurrently with it, so that the sentence of imprisonment can take effect instead of the sentence of corrective training.

Appeal against sentence.

The appellant was convicted at the Isle of Wight Quarter Sessions on October 3, 1956, of housebreaking and larceny, and was sentenced to fifteen months' imprisonment to commence on the expiration of a sentence of three years' corrective training which he was then serving.

No counsel appeared.

THE LORD CHIEF JUSTICE: In June, 1955, this appellant was convicted of shopbreaking and sentenced to three years' corrective training, which he was serving at Camp Hill Corrective Training Establishment in the Isle of Wight. On September 23, 1956, he broke out and escaped from the Training Establishment and committed another housebreaking in the Isle of Wight. He was found in a house which had been left temporarily unoccupied, the members of the household being out at the time. He was brought before the Quarter Sessions for the Isle of Wight on October 3, 1956, and was sentenced to fifteen months' imprisonment consecutive to the sentence of

three years' corrective training which he was then serving. His sentence of corrective training would have expired on June 7, 1958.

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This court has before now (see PHILLIPS, *infra*) said that in its opinion it is usually wrong to impose a sentence of imprisonment to follow on a sentence of corrective training. If a prisoner who has been sentenced to corrective training is brought before a court before the period of corrective training has expired, it is not desirable to send him back to finish the corrective training and then serve a sentence of imprisonment because the corrective training has not improved his character. We think that the right thing to do in this case, as this court has done in another case, is to pass a sentence of imprisonment which will absorb and take effect instead of the sentence of corrective training. We set aside the sentence of fifteen months' imprisonment and order that as from October 3, 1956, he shall receive a sentence of three years' imprisonment to be served concurrently with the sentence of corrective training. That will mean that he will serve a sentence of imprisonment instead of corrective training.

Sentence varied.

In the case of QUINTON PHILLIPS on February 18, 1957, the judgment of the court (Cassels, Gorman and Hinchcliffe JJ.) was in the following terms :

CASSELS J. : This appellant pleaded guilty at the Isle of Wight Quarter Sessions on October 4, 1956, to housebreaking and larceny and asked for three other cases to be taken into consideration. He was sentenced by the chairman to eighteen months' imprisonment, the sentence to be consecutive to a sentence of corrective training which at the time he was serving and from which he escaped. It was during the free time which he had acquired for himself that the offences which brought him before quarter sessions were committed. He has appealed against that sentence, objecting to having had passed upon him a sentence of eighteen months' imprisonment to follow a sentence of corrective training. The court gave leave to appeal

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so that it might consider whether the sentence was a proper one and, if it came to the conclusion that it was not, how it should be either reduced or varied.

This matter has been before this court before and this court has said on several occasions that it is unwise to pass a sentence of imprisonment to follow a sentence which has been passed with a view to reformatory treatment. We think that the appellant has presented to the court a point worthy of consideration. We have had information from the Prison Commissioners that it is unsatisfactory that prisoners should be under a sentence of corrective training to be followed by a sentence of imprisonment, and we have decided that there is nothing to prevent us from varying the sentence passed on this appellant. We do so vary it; and the direction of the court is that there shall be substituted for the sentence of eighteen months' imprisonment a sentence of 3 years' imprisonment, but that it shall start from October 4, 1956. That will have the effect of passing over the sentence of corrective training, which the appellant will no longer have to serve. There will be an order under section 22 of the Criminal Justice Act, 1948.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

1957
May 8

HOBSON v. IMPETT

*Receiving Stolen Goods—Mere Handling of Stolen Property Not
Sufficient—Control Required—Larceny Act, 1916 (6 & 7 Geo. 5,
c. 52), s. 33.*

If a person knows that goods are stolen and puts his hands on them, the mere manual possession does not of itself make

him guilty of receiving stolen goods, because the control may be in some other person. It is essential that he should be in control of the goods either solely or jointly with some other person before he is liable to be convicted.

Where, therefore, the defendant helped other persons to load ingots into a motor-car by picking some of them up and carrying them from a house to the car, knowing that they were stolen and that they were being taken in the car to be offered for sale, but it was not proved that the defendant touched the ingots again or took any part in offering them for sale, and an appeal committee of quarter sessions, on an appeal by the defendant from conviction at a magistrates' court, were of opinion that, because the appellant was in manual possession of the ingots, he therefore received them within the meaning of section 33 of the Larceny Act, 1916, and convicted him on this ground.

Held, that the appeal committee, as judges of fact, were in the same position as a jury and that, if a jury had been given such a direction, the conviction would have to be quashed, and therefore the Divisional Court had no alternative but to quash this conviction.

Case stated by the Appeal Committee of West Kent Quarter Sessions.

The appellant was convicted at a magistrates' court of receiving stolen ingots and was committed for sentence, under section 29 of the Magistrates' Courts Act, 1952, to West Kent Quarter Sessions. He appealed against his conviction, and on the hearing of his appeal the following facts were found by the Appeal Committee. There having been a breaking and entering of a store on January 14, 1957, the appellant, who lodged with the family of one George Porritt, at 11 Castle Street, Stone, helped the said George Porritt to unload from a cart a sack which contained some of the stolen ingots and take the said ingots in to the said premises. At the conclusion of the unloading on January 14 the appellant knew that the sack contained ingots, and knew that the said ingots were stolen. On January 15, 1957, the appellant helped the said George Porritt and one Ackleton to load fifteen of the said ingots (no point being taken on the question of quantity) into the back of a motor-car by picking up some of the ingots and carrying them from the

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aforesaid premises to the motor-car. The appellant knew that the said ingots were stolen and were being taken in the car to be offered for sale. The appellant travelled in the car as a passenger, but it was not proved that he touched the ingots again or took any part in offering them for sale at the end of the journey. In the course of the said journey the appellant was for a time left alone with the said ingots in the car. Later on January 15, 1957, police officers found sixty-three of the stolen ingots at the aforesaid premises and arrested the appellant on the said premises immediately thereafter.

The Appeal Committee dismissed the appeal and sentenced the appellant, who appealed to the Divisional Court.

D. C. Humphreys for the appellant.

B. R. Clapham for the respondent.

THE LORD CHIEF JUSTICE: This is a Case stated by the Appeal Committee of West Kent Quarter Sessions, to whom the appellant appealed from conviction by justices for receiving stolen goods. At the magistrates' court he was convicted, and I should think rightly convicted, and committed for sentence under section 29 of the Magistrates' Courts Act, 1952, but he appealed against his conviction. The Appeal Committee heard the appeal and dismissed it, subject to the Case which they have stated to this court. [After stating the facts set out above, His Lordship continued:]

The Appeal Committee were of opinion "that by taking up and carrying the ingots to the motor-car the appellant was in manual possession of them and received them within the meaning of the section." I can only read that as meaning that because he was in manual possession of them he therefore received them. They dismissed the appeal and proceeded to sentence the appellant. The question for the opinion of the High Court is "whether on the facts stated the appellant received any of the ingots, within the meaning of section 33 of

the Larceny Act, 1916, and whether the court directed itself correctly on the law."

For myself, I should have had no hesitation on the facts in finding that the appellant did receive the goods knowing them to have been stolen on the 15th, but the Appeal Committee ask us if they directed themselves correctly in point of law, and the answer is that they did not. It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only picking the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping. What the Appeal Committee might have found on these facts, and could obviously have found, was that there was a joint possession here and that both Porritt and this appellant were receiving the goods. But the court can only come to the conclusion that the Appeal Committee, by the way in which they have stated the Case, mean: "We found he received the goods because we had directed ourselves in this way, that the mere manual possession in these circumstances was sufficient to be a felonious possession." That is far too wide. It cannot be the law that merely because a man picks up goods which he knows are stolen he is receiving the goods. As the Appeal Committee have emphasised this question of manual possession and told us they found that that is what the appellant had and that accordingly he received the goods, and as they ask us whether they directed themselves correctly, the answer is that they did not direct themselves correctly. The Appeal Committee are judges of law and fact, and we are in exactly the same position as if the case had been tried by a jury and the jury had been given this direction. If the jury had been given this direction, clearly the court would have to quash the conviction. As far as I can see,

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the only course the court can take is to quash the conviction on this ground.

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HILBERY J. : I agree.

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DONOVAN J. : I agree.

Appeal allowed.

Solicitors: Hewitt & Co., Dartford, for the appellant; Sharpe, Pritchard & Co., agents for N. K. Cooper, Maidstone, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DEVLIN

1957
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PRACTICE NOTE

APPEALS IN NON-CAPITAL MURDER

THE LORD CHIEF JUSTICE: The Court has received an application for leave to appeal against sentence from a young woman who was convicted at the last assizes for the West Riding of Yorkshire of non-capital murder under the Homicide Act, 1957, and sentenced to imprisonment for life. She has sent in a notice asking for leave to appeal against her sentence, but the notice cannot be received because section 3 (c) of the Criminal Appeal Act, 1907, provides that a person may appeal against a sentence "unless the sentence is one fixed by law." The sentence for non-capital murder is now fixed by law by section 9 (1) of the Homicide Act as imprisonment for life; therefore the notice cannot be accepted.

I also wish to say that in the past all the applications for leave to appeal in capital cases were treated as final appeals and put in the list as final appeals and the prosecution was represented so that, if the appeal was dismissed, the capital

sentence would not be postponed. In all non-capital murder cases now, the cases will be treated in the ordinary way as applications for leave to appeal and will be listed simply as applications, and the prosecution need not be represented unless leave to appeal is given. Of course, if the ground of appeal is one of law only, it will be treated as an appeal, as no application for leave is then required.

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BEFORE

MR. JUSTICE BYRNE, MR. JUSTICE SLADE
AND MR. JUSTICE GLYN-JONES

ALFRED GEORGE HINDS

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*Escape—Prisoner Serving Sentence—Departure from Prison by
Walking Out without Breach.*

A person who is confined in a prison, either serving a sentence or awaiting trial, and who leaves that prison by walking out of it without any breach of prison, is guilty of the common law offence of escape.

Appeal against conviction.

The appellant was convicted at Nottingham City Assizes on March 6, 1957, of escape and was sentenced by Finnemore J. to 11 days' imprisonment.

The appellant was at the time serving a sentence of preventive detention in Nottingham Prison. On November 22, 1955, he escaped from the prison by walking out of a door which had been opened by another prisoner confined there and the appellant did not himself do any act amounting to a "breaking" of the prison. The appellant was arrested in Dublin on July 31, 1956, on a warrant issued in Nottingham and endorsed for execution in Dublin and brought back to England. Another count in the indictment which charged the appellant with

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prison breach was withdrawn from the jury by the judge at the close of the case for the prosecution.

The appellant in person.

Claude H. Duveen, Q.C. and *E. G. H. Beresford* for the Crown were not called on to argue.

BYRNE J. : The appellant was convicted on December 16, 1953, at the Central Criminal Court of shopbreaking and larceny and was sentenced to twelve years' preventive detention. He was confined in Nottingham Prison serving that sentence and on November 26, 1955, escaped from the prison by walking out of it. He found his way to Ireland and on July 31, 1956, was arrested in Dublin on a warrant issued in Nottingham and endorsed for execution in Dublin and was brought back to England the next day. There were no extradition proceedings of any kind.

He duly appeared at Nottingham Assizes on March 6, 1957, when he was charged in an indictment which contained two counts. In the first count he was charged with prison breach and in the second with escaping from prison. The case was tried before Finnemore J. and a jury and at the close of the case for the prosecution the learned judge ruled that there was no evidence, or insufficient evidence, for the case to go to the jury on the count charging prison breach and the trial then proceeded on the other count of escaping from prison. In the result, the appellant was convicted on that count and the learned judge, not desiring to add to the length of time which the appellant already had to serve, passed a nominal sentence of eleven days' imprisonment.

The appellant now appeals to this court and takes a number of points, but the important point, as he alleges, is the fact that the judge, so he says, misdirected the jury on a matter of law, because, says the appellant, he should have told the jury that there is no such thing as a common law offence of escaping from prison in the case of a person who is serving a sentence in that prison. It is sufficient for this court to say that his view

of the law is completely erroneous and that it is a common law offence for a person who is confined in a prison, either serving a sentence or awaiting trial, to escape.

Another point which he takes is that he was prevented from letting the jury know, by cross-examination or by evidence that his reason for desiring to leave the prison and for leaving it was in order to draw attention to illegalities which, he says, were going on in the prison. He says that was a relevant matter for the jury to know and that he was prevented by the learned judge from letting the jury know it. It is sufficient, in dealing with that contention, to say that the motive for leaving the prison was irrelevant. A person may leave a prison with a good or bad motive. All the jury had to try was whether he had in fact escaped from lawful custody while in that prison.

He has raised one or two other points, which are all contained in the two points with which I have already dealt. The evidence in the case was plain beyond words. The evidence was that the appellant had left the prison and was subsequently arrested in Ireland and brought back to this country, and there could not have been a plainer case for any jury to investigate. The learned judge conducted the trial with exemplary patience. He listened to various submissions made by the appellant and treated the appellant with every consideration. This court can find nothing at all in any of the arguments which the appellant has addressed to it and in those circumstances this appeal is dismissed.

Appeal dismissed.

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Byrne J.,
Slade J.,
Glyn-Jones J.

[QUEEN'S BENCH DIVISION]

BEFORE

THE LORD CHIEF JUSTICE

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TREASURY v. HARRIS AND ANOTHER

Sentence—Fine—Death of Defendant—Right of Crown to Recover from Personal Representatives—Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 2—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), ss. 13, 14 & 15.

On May 17, 1952, H., on being convicted of felony, was sentenced to two years' imprisonment and fines, and, pursuant to section 14 (1) (c) and (3) of the Criminal Justice Act, 1948, four months' "additional imprisonment" was imposed in default of payment of the fines. On January 7, 1953, H. died while serving the term of imprisonment and before any part of the fine had been paid. The Crown sued his personal representatives for the amount of the fine.

Held, that the Crown was entitled to recover, as a debt of record due to the Crown arises as soon as a sentence of a fine is pronounced, and there is nothing either in section 14 or section 15 (which was a procedural section) of the Criminal Justice Act, 1948, which prevents it from remaining a debt of record until paid.

WOOLF (1819) 2 B. & Ald. 609 applied.

Where a court intends that a term of imprisonment in default of payment of a fine should not begin to run until the expiration of another term of imprisonment which the court has imposed, it is desirable that the court should follow the words of section 14 (3) of the Criminal Justice Act, 1948, in passing the sentence.

Action tried by the Lord Chief Justice without a jury.

On May 17, 1952, Arthur Frank Harris was convicted at Southampton Quarter Sessions on four counts for receiving. The Recorder ordered that he be imprisoned for 2 years on each count, the sentences to run concurrently, and also ordered him to pay a fine of £250 on each count (£1,000 in all). In passing sentence, the Recorder said: "In default of the payment of

any of the fines there will be a further sentence of four months' imprisonment consecutive in respect of each fine." The sentence was endorsed on the indictment as: "2 years' imprisonment concurrently and fine of £250 on each of the first, second, third and fourth counts and to pay £250 towards costs and 4 months' additional imprisonment in respect of each fine in default of payment." The certificate of conviction drawn up by the Clerk of the Peace was in similar terms. Pursuant to section 2 of the Levy of Fines Act, 1822, the Clerk of the Peace entered the fines on the Sheriff's estreat roll, the entry concluding with the words "to be paid on or before expiration of terms of imprisonment to which sentenced at the same sessions." On January 7, 1953, while serving the sentence of two years' imprisonment, Harris died.

Pursuant to section 17 (2) of the Crown Proceedings Act, 1947, Her Majesty's Treasury, on behalf of the Crown, brought an action against the defendants Elizabeth Harris and Frank Harris, the administrators of the estate of Arthur Frank Harris, suing them as personal representatives and claiming £1,000. By the statement of claim it was pleaded that, on being copied by the Clerk of the Peace on to the estreat roll, the fines became, or, alternatively, as soon as they were imposed, were, debts of record owed by Arthur Frank Harris to the Crown; that on January 7, 1953, or alternatively, on May 17, 1954, the terms of imprisonment imposed on Harris expired: and that on one or other of those dates the fines and debts became due and payable to the Crown by him or by his estate. The defendants, in their defence, alleged that if the order made in respect of terms of imprisonment in default of payment of fines provided that Arthur Frank Harris should have time to pay until the date of the expiration of his term of imprisonment, then, by reason of his earlier death, that date had never arrived and the powers of recovery of the fines were in abeyance pursuant to section 15 (3) of the Criminal Justice Act, 1948; alternatively, that if he was ordered to undergo a further four months' imprisonment in respect of each fine not paid, to be served consecutively, those further terms of imprisonment began on May 17, 1952, and at

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the date of his death he had served a proportion of those further terms, whereby the fines had been proportionately abated pursuant to section 15 (5) of the Act of 1948. They further contended that the right to recover the fines lapsed on the death of Arthur Frank Harris.

Rodger Winn for the plaintiff.

E. S. Fay, Q.C., and *T. R. Crawford* for the defendants.

THE LORD CHIEF JUSTICE: This is an action brought by the Treasury pursuant to the Crown Proceedings Act, 1947, to recover against the administrators of Arthur Frank Harris the sum of £1,000, being the amount of four fines of £250 each imposed on him for certain offences of which he was convicted by the Recorder of Southampton on May 17, 1952. The convictions were convictions for felony, and the Recorder passed a sentence of two years' imprisonment and ordered that the prisoner should pay a fine of £250 on each of the four counts and costs and should undergo four months' additional imprisonment in respect of each fine in default of payment.

I say at once that, in my opinion, the words "additional imprisonment" mean imprisonment to follow on the imprisonment which had been awarded in the first part of the sentence. That is to say, the sentence was two years' imprisonment on each of four counts in the indictment, to run concurrently, and a fine of £250 and the additional, that is to say, consecutive sentence if he did not pay. Had he not died, it would have been contended that he owed the amount of the fines when he went into prison, but that the additional sentence could not take effect until he had failed to pay the money and had served the substantive sentence, because otherwise it would not be "additional" to the substantive sentence of two years' imprisonment which had been passed.

The question which arises is whether or not the personal representatives of a dead man, on whom a sentence involving the payment of a fine has been imposed, can be sued by the Crown for the fine. Apparently there is no authority on the

point that the industry of counsel can find, but I also have to consider the provisions of the Criminal Justice Act, 1948. It is important to remember that the conviction here was for a felony, and that, but for the Criminal Justice Act, 1948, a fine could not have been imposed at all, because at common law it is extremely doubtful whether a fine ever could be imposed for a felony. In fact, it was not until the middle of Queen Victoria's reign that provision was made by statute for the penalty of a fine to be imposed in certain cases of felony, but only in those cases which could be dealt with summarily.* It can, therefore, be stated quite definitely that a court of indictment had generally no power until the Criminal Justice Act, 1948, came into force to impose a punishment other than imprisonment for a felony. By section 13 of the Criminal Justice Act, 1948, "Any court before which an offender is convicted on indictment of felony . . . shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him." By section 14 (1) "Subject to the provisions of this section, where a fine is imposed by . . . a court of assize or quarter sessions, an order may be made—(a) allowing time for the payment of the amount of the fine . . . (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered. . . . Provided that any term of imprisonment fixed under this subsection in default of payment of a fine shall not exceed twelve months.

. . . (3) Where any person liable for the payment of a fine . . . to which this section applies is sentenced by the court to . . . a term of imprisonment, the court may order that any term of imprisonment fixed under paragraph (c) of subsection (1) of this section shall not begin to run until after the end of the first-mentioned term of imprisonment." Although it might be as well if, where the court intends a sentence of imprisonment for non-payment of a fine to follow on a term of imprisonment, the words used in section 14 (3) were followed, I am satisfied

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* Also for manslaughter. See Offences against the Person Act, 1861, s. 5.

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that that was the intention of the Recorder when he ordered "additional" imprisonment.

Mr. Fay, in the course of a careful argument, submitted that under the provisions of sections 14 and 15 this action cannot lie because, amongst other things, the sheriff is the only person who can recover this debt, and there has been no default. The first thing which has to be considered is: what is the nature of a fine? A fine is, of course, a monetary penalty, but it is a monetary penalty due to the Crown, and, in my opinion, when a defendant is sentenced to pay a fine, there arises at once a debt of record to the Crown. A civil debt can be a debt of record, as of course a judgment debt is. A fine, in my opinion, is also a debt of record and the person entitled to the fine is the Crown (except in the very few exceptional cases where corporations, by charter, have been given the right to receive certain fines). Generally speaking, apart from immaterial exceptions, the fine goes to the Exchequer and is a debt due to the Crown. In *WOOLF* (1819) 2 B. & Ald. 609 it was held: "Where a defendant, in an indictment for a misdemeanour, has received judgment of fine and imprisonment" —as was the case here—"a *levari facias* may issue immediately to take his goods in execution of the fine." For some reason which, I dare say, is founded on history, if a debt had to be levied by the sheriff at the suit of the Crown, the writ was called a *levari facias*; I do not think that writ really differs in any material respect from a *feri facias*, but it is not necessary to go into that. In 1819, therefore, there was a decision that, as soon as the judgment of fine was pronounced, the sheriff could levy. It is true that in 1822 the Levy of Fines Act was passed to provide for "the more speedy return and levying of fines, penalties and forfeitures, and recognisances estreated." I suppose that it may have been passed partly on account of the decision in *WOOLF* (*supra*), because it was thought that a more expeditious method of levying fines would be thereby provided. That Act is referred to in the Criminal Justice Act, 1948, as though it were an effective and live Act, but it appears from the judgment in *Brook*, 33 Cr.App.R. 92; [1949] 2 K.B.

138, that, by reason of some of the provisions in the Act of 1948, very considerable amendments have been made to the law contained in it. But, after all, I am concerned only with the provisions of sections 14 and 15 of the Act of 1948, and it does not seem to me that there is anything in either of those sections which in any way alters the law that a fine is a debt due to the Crown. Section 14 (1) (c) provides that the court may "fix a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered," and I think that the use of the word "recovered" shows that the Crown may take steps to recover the money. The ordinary steps would be to recover the money by means of a writ, whether it be of *levari facias* or *fieri facias* matters not, but it would be difficult for them to take proceedings under the Levy of Fines Act, 1822.

The difficulty in this case has arisen because Harris died while serving the substantive sentence of imprisonment passed on him, and the fines had never been levied, since it was thought that he could wait until he had finished that sentence to pay them. I need not decide now whether, under an order drawn up as the order in this case was drawn up, it is to be presumed that the Recorder gave him time to pay the fine until he came out of prison. I think that he probably did not. It seems to me, from the conviction as it was drawn up, that the fines were payable immediately, and, if they were not paid by whoever had the management of his affairs while he was in prison—and a receiver could be appointed if necessary—the defendant would have to undergo, instead of a sentence of two years, a sentence of two years and four months, but he could always avoid the additional four months by paying. If it is necessary for me to decide it, it does not seem to me that, under the form of order and conviction drawn up, the payment of the fines was postponed until Harris came out of prison. However, whether it was or was not postponed, the time has long gone by when those fines should have been paid, and the question is whether the fact of his death, so that he could no

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longer be imprisoned, has done away with the fines. In my opinion, it has not. I think that the fine is a debt due to the Crown and remains a debt due to the Crown. Although there may be various consequences which can be imposed by the court if a defendant does not pay, I do not think that there is anything in either section 14 or section 15 of the Criminal Justice Act, 1948, which says that a defendant can prevent the Crown from recovering the amount of a fine by electing to go to prison, although I have no doubt that, if he does go to prison, the imprisonment wipes out the fine. Where a fine has been imposed by a court and the defendant has gone to prison in default of payment, it is not uncommon for some sympathiser or person interested in the particular matter to pay the fine for the defendant. If the Crown gets the money, the Crown cannot keep the defendant in prison, and I doubt very much whether, once the money has been paid, the defendant can refuse to leave prison. This court has had to deal with curious cases in which persons imprisoned for contempt, for not executing deeds or documents, and so forth, have refused to apply to be released, even though, to secure release, they have only to sign the documents and the court has implored them to do so. In one or two cases we have had persons who have said that they were more comfortable in prison than outside, and that they preferred to stay where they were. Those were cases of civil process, but in criminal process I do not think that would apply. If a sympathiser comes forward and pays the fine, he has discharged the Crown's debt; the Crown has received the money, and I do not think that the person fined can say that he objects to it and will remain in prison.

Mr. Fay called attention to the provisions of section 15 of the Criminal Justice Act, 1948, and pointed out the difficulty of reconciling those provisions with the Levy of Fines Act, 1822. Should this case go to the Court of Appeal, it will be open to that court to consider the judgment of the Court of Criminal Appeal in *BROOK (supra)*. In that case the Court of Criminal Appeal, in their judgment, expressed the opinion that, once

the Criminal Justice Act, 1948, was passed, there was very little left of the Levy of Fines Act, 1822. The Court of Appeal will, no doubt, be free to say whether they agree with that proposition. But I cannot find anything in section 15, which I hold to be procedural, which provides that, if a defendant has assets, there is anything to prevent the sheriff from levying. If no levy can take place, it is difficult to understand what meaning can be given to the words "or recovered" in section 14 (1) (c). Those words cannot, in my opinion, be confined to the case where the Crown recovers the fine by being paid by a friend or relative of the person convicted. I think they must mean "paid or recovered" by process of law.

Section 15 was necessary because of the fact that section 14 contemplates that time to pay may be allowed; once time is allowed, the convicted person may make application for further time, and there is also a provision for payment by instalments and the convicted person can ask the court to vary the instalments; then there are the provisions that, if a defendant is sentenced to pay a fine and does not pay it and is taken to prison, he can buy his release by paying the money. Then, by section 15 (5) (b), if he pays a part of the fine "the total number of days in the term of imprisonment shall be reduced proportionately, that is to say, by such number of days as bears to the said total number of days less one day the proportion most nearly approximating to, without exceeding, the proportion which that part paid bears to the amount of the fine." In other words, if a defendant has been sentenced to a month's imprisonment and after a week's imprisonment pays three-quarters of the fine, or substantially three-quarters of the fine, he can be discharged. It seems to me, although the matter is not altogether clear, that, if the provisions of section 15 be regarded as procedural—indeed the marginal note is "Incidental provisions as to fines and forfeited recognisances"—the debt remains until it is paid.

Turning to the authority of the sheriff, his only authority is to levy on the goods of the defendant himself, and if the

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defendant has died, a difficulty arises. In a civil suit provision is made, by the Rules of Court, for an application to be made to the court for leave to issue execution against the dead man's assets, which would be in the hands of his executors or administrators. Section 15 seems to make no provision for the eventuality of the death of a defendant who has been sentenced to a fine or imprisonment in default. There is a difficulty, I think, in ordering the sheriff to seize, but I think that, in the case of a convicted person sentenced to pay a fine who is alive, execution can issue against his assets, although, if he does not pay, he may also be liable to be imprisoned. The sheriff may take his body or his goods, and if the goods realise part only of the fine, the provisions of section 15 (5) (b) with regard to the reduction of the term of the imprisonment in relation to the proportion of the fine that is paid would apply. But as this is a criminal matter, and not otherwise provided for, I see no reason why the Crown should not sue for the amount of the fine. I still think that it is a debt, and that for those reasons the Crown can sue.

It seems to me that it is desirable that the Crown should be able to do so, although the defendant is dead. I do not want to throw doubt—and I do not think that any doubt could be thrown—on the power of the court in cases of this sort, not only to punish a defendant for a crime which he has committed, but also to take steps to see that he should not benefit by keeping the proceeds of the crime; and I think that it is equally important that, if the defendant is dead, his estate should not benefit by the proceeds of the crime.

For these reasons, although the point is not an easy one and is new, there must be judgment for the Treasury for the sum of £1,000 and costs.

Judgment for plaintiff.

Solicitors: Treasury Solicitor, for the plaintiff; Speechly, Mumford and Craig, agents for Lamport, Bassitt & Hiscock, for the defendants.

BEFORE

MR. JUSTICE BYRNE, MR. JUSTICE SLADE
AND MR. JUSTICE BARRY

ROY CUNNINGHAM

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Maliciously Causing Noxious Thing to be Taken—Coal Gas—Gas Main Fractured during Larceny of Meter—Seeping of Gas through Cellar Wall to Adjoining House—Meaning of “Maliciously”—Mere Wickedness not Sufficient—Direction to Jury—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 23.

In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general, but as requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not, *i.e.*, the accused person must have foreseen that the particular kind of harm might be done and yet gone on to take the risk of it. It is neither limited to, nor does it indeed require, any ill-will towards the person injured.

PEMBLITON (1874) L.R. 2 C.C.R. 119 followed.

The appellant broke open a gas meter in a house, took it away and stole its contents. In doing so he unknowingly fractured the gas main, and coal gas seeped through the cellar wall to the house next door, and W., an occupant of that house, inhaled a considerable amount of coal gas into her lungs and her life was endangered. The appellant was convicted of unlawfully and maliciously causing to be taken by W. a certain noxious thing, namely coal gas, so as thereby to endanger the life of W., contrary to section 23 of the Offences against the Person Act, 1861. The judge directed the jury: “‘Malicious’ for this purpose means wicked—something which he has no business to do and perfectly well knows it.”

Held, that there had been a misdirection in law; that it should have been left to the jury to decide whether, even if the appellant did not intend the injury to W., he foresaw that the removal of the gas meter might cause injury to someone, but nevertheless removed it; and that the conviction must be quashed.

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Appeal against conviction.

The appellant pleaded Guilty at Leeds Assizes on March 26, 1957, to larceny of a gas meter and contents and was sentenced by Oliver J. to six months' imprisonment. In respect of that matter he did not appeal. He was convicted on March 27, 1957, of unlawfully and maliciously causing a noxious thing to be taken, so as thereby to endanger life, contrary to section 23 of the Offences against the Person Act, 1861, and was sentenced on that charge to five years' imprisonment.

On January 17, 1957, the appellant, who was then in financial difficulties, went to 7A, Bakes Street, Bradford, a house rented by his prospective mother-in-law for him and his fiancée, and broke open and took away a gas meter and stole its contents. In doing so he unknowingly fractured the gas main, and coal gas seeped through the cellar wall to the house next door, and Mrs. Wade, who was in bed at the time, inhaled a considerable amount of coal gas into her lungs and was in a serious condition. Although there was a stop tap within 2 ft. of the meter, the appellant did not turn off the gas.

In his summing-up the judge directed the jury that they had to decide whether, when he loosed "that frightful cloud of coal gas" to the lady, he caused her to take it by his unlawful and malicious action. "'Malicious' for this purpose," said the judge, "means wicked—something which he has no business to do and perfectly well knows it."

S. E. Brodie, for the appellant. "Malicious" in section 23 imports *mens rea* of some kind. The nature of the *mens rea* required is either that the appellant must have intended to do the particular kind of harm that was actually done or the actual harm done must have been foreseeable and the appellant must have nevertheless continued his conduct recklessly, not caring what the result might be.

In *PEMBLITON* ((1874) L.R. 2 C.C.R. 119) the accused threw a brick into a crowd intending to hit one of them, but instead he broke a glass window. It was held that that was not "malicious" damage to property as he had not intended the

type of harm which in fact occurred. In *LATIMER* ((1886) 17 Q.B.D. 359) the accused struck at one person with a belt, missed, and hit a bystander. His conviction was upheld because he had intended the particular type of injury that in fact occurred. [He referred also to *FAULKNER* (1877) 13 Cox 550.] These cases are authority for the proposition submitted that there must be some element of *mens rea* present.

[Slade J. : Mere wickedness, you contend, cannot be statutory malice ?] That is my third contention. It was a misdirection for the judge to tell the jury that “malicious” merely meant “wicked.”

J. S. Snowden, for the Crown. In view of the authorities it would be very difficult to uphold the direction given to the jury on the meaning of the word “maliciously.” [He referred to *MARTIN* (1881) 8 Q.B.D. 54.]

[*BYRNE J.* : The jury were probably left with the idea that they ought to convict if what the appellant did was, in the popular sense, a “wicked” act.]

At the conclusion of the arguments *BYRNE J.* said that the appeal would be allowed and the conviction quashed, and that the court would give the reasons for their decision at a later date.

Cur. adv. vult.

May 27. The judgment of the court was read by

BYRNE J. : The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at Leeds Assizes upon an indictment framed under section 23 of the Offences against the Person Act, 1861, which charged that he unlawfully and maliciously caused to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as thereby to endanger the life of the said Sarah Wade.

The facts were that the appellant was engaged to be married and his prospective mother-in-law was the tenant of a house,

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No. 7a, Bakes Street, Bradford, which was unoccupied but which was to be occupied by the appellant after his marriage. Mrs. Wade and her husband, an elderly couple, lived in the house next door. At one time the two houses had been one, but when the building was converted into two houses a wall had been erected to divide the cellars of the two houses, and that wall was composed of rubble loosely cemented. On the evening of January 17 last the appellant went to the cellar of No. 7a, Bakes Street, wrenched the gas meter from the gas pipes and stole it, together with its contents, and in a second indictment he was charged with the larceny of the gas meter and its contents. To that indictment he pleaded Guilty and was sentenced to six months' imprisonment. In respect of that matter he does not appeal. The facts were not really in dispute, and in a statement to a police officer the appellant said: "All right I will tell you. I was short of money, I had been off work for three days, I got eight shillings from the gas meter. I tore it off the wall and threw it away." Although there was a stop tap within two feet of the meter, the appellant did not turn off the gas, with the result that a very considerable volume of gas escaped, some of which seeped through the wall of the cellar and partially asphyxiated Mrs. Wade, who was asleep in her bedroom next door, with the result that her life was endangered.

At the close of the case for the prosecution Mr. Brodie, who appeared for the appellant at the trial and who has appeared for him again in this court, submitted that there was no case to go to the jury, but the learned judge, quite rightly in our opinion, rejected this submission. The appellant did not give evidence.

The act of the appellant was clearly unlawful and therefore the real question for the jury was whether it was also malicious within the meaning of section 23 of the Offences against the Person Act, 1861. Before this court Mr. Brodie has taken three points, all dependent upon the construction of that section. Section 23 provides as follows: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to

or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony.” Mr. Brodie argued, first, that *mens rea* of some kind is necessary. Secondly, that the nature of the *mens rea* required is that the appellant must have an intention to do the particular kind of harm that was done, or alternatively he must foresee that that harm may occur, yet nevertheless continue recklessly to do the act. Thirdly, that the learned judge misdirected the jury as to the meaning of the word “maliciously.” He cited the following cases: PEMBLITON (1874) L.R. 2 C.C.R. 119; LATIMER (1886) 17 Q.B.D. 359; and FAULKNER (1877) 13 Cox 550. In reply Mr. Snowden, on behalf of the Crown, cited MARTIN (1881) 8 Q.B.D. 54.

We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. Kenny in the first edition of his *Outlines of Criminal Law*, published in 1902, and repeated in the sixteenth edition edited by Mr. J. W. Cecil Turner and published in 1952: “In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) Recklessness as to whether such harm should occur or not (*i.e.*, the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured.” The same principle is repeated by Mr. Turner in his tenth edition of *Russell on Crime* at p. 1592. We think that this is an accurate statement of the law. It derives some support from the judgments of Lord Coleridge C.J. and Blackburn J. in PEMBLITON’s case (*supra*). In our opinion, the word “maliciously” in a statutory crime postulates foresight of consequence.

In his summing-up the learned judge directed the jury as follows: “You will observe that there is nothing there about

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‘with intention that that person should take it.’ He has not got to intend that it should be taken; it is sufficient that by his unlawful and malicious act he causes it to be taken. What you have to decide here, then, is whether, when he loosed that frightful cloud of coal gas into the house which he shared with this old lady, he caused her to take it by his unlawful and malicious action. ‘Unlawful’ does not need any definition. It is something forbidden by law. What about ‘malicious’? ‘Malicious’ for this purpose means wicked—something which he has no business to do and perfectly well knows it. ‘Wicked’ is as good a definition as any other which you would get. The facts which face you (and they are uncontradicted and undisputed; the prisoner has not gone into the box to seek to give any particular explanation) are these. Living in the house, which was now two houses but which had once been one and had been rather roughly divided, the prisoner quite deliberately, intending to steal the money that was in the meter—*there* it is (indicating Exhibit 1)—broke the gas meter away from the supply pipes and thus released the mains supply of gas at large into that house. When he did that he knew that this old lady and her husband were living next door to him. The gas meter was in a cellar. The wall which divided his cellar from the cellar next door was a kind of honeycomb wall through which gas could very well go, so that when he loosed that cloud of gas into that place he must have known perfectly well that gas would percolate all over the house. If it were part of this offence—which it is not—that he intended to poison the old lady, I should have left it to you to decide, and I should have told you that there was evidence on which you could find that he intended that, since he did an action which he must have known would result in that. As I have already told you, it is not necessary to prove that he intended to do it; it is quite enough that what he did was done unlawfully and maliciously.”

With the utmost respect to the learned judge, we think it is incorrect to say that the word “malicious” in a statutory offence merely means wicked. We think the learned judge was

in effect telling the jury that if they were satisfied that the appellant acted wickedly—and he had clearly acted wickedly in stealing the gas meter and its contents—they ought to find that he had acted maliciously in causing the gas to be taken by Mrs. Wade so as thereby to endanger her life.

In our view, it should have been left to the jury to decide whether, even if the appellant did not intend the injury to Mrs. Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it. We are unable to say that a reasonable jury, properly directed as to the meaning of the word “maliciously” in the context of section 23, would without doubt have convicted.

In these circumstances this court has no alternative but to allow the appeal and quash the conviction.

Conviction quashed.

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[JUDICIAL COMMITTEE OF PRIVY COUNCIL]

BEFORE

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TAMESHWAR AND ANOTHER *v.* REGINAM

Trial—View of Locus in Quo with Witnesses—Presence of Judge Essential.

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Although there may be nothing wrong in a simple view of an object or a scene by the jury without witnesses being present taking place in the absence of the judge, it is wrong for a view with witnesses to take place in the absence of the judge and it is a defect which would vitiate a trial.

MARTIN AND WEBB (1872) L.R. 1 C.C.R. 378 considered.

Appeals against convictions.

The appellants Tameshwar and Seokumar appealed by special leave *in forma pauperis* from a judgment dated April 4,

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1956, of the Court of Criminal Appeal of British Guiana dismissing their appeals from their convictions before Miller J. and a jury on a charge of robbing on February 25, 1954, when armed with a cutlass and a gun, one Sherry Browne of a bag containing \$13,129.68. They had been each sentenced to ten years' penal servitude and six strokes by flogging. Both had pleaded Not Guilty and had relied on alibis. The flogging had not been carried out.

There was a view of the *locus in quo* by the jury in the presence of prosecution witnesses who gave evidence there in the absence of the trial judge, and the main contention for the appellants on this appeal was that the view was part of the trial and that to deprive a prisoner of the right to have the judge in possession of all the testimony so that he might charge the jury in the light of all the evidence was to deprive him of a proper trial and was a wholly improper procedure which vitiated the trial.

Bernard Gillis, Q.C., and J. Lloyd-Eley, for the appellants.
J. G. Le Quesne, for the Crown.

LORD DENNING: At the close of the argument, their Lordships announced that they would humbly advise Her Majesty to allow the appeals and quash the convictions, and they now give their reasons for the advice which they tendered.

The point on which special leave to appeal was granted was the fact that the jury had a view with witnesses in the absence of the judge. The question is whether that vitiates the trial. The judges in the Court of Criminal Appeal were divided in opinion. Holder C.J. and Phillips J. thought that it would not warrant their holding that the trial was irregular. Story J. held that the judge's absence was fatal.

The material facts are these: at about 7.15 a.m., on February 25, 1954, a postal apprentice named Sherry Browne, aged nineteen, was entrusted with a bag containing \$13,129.68 to carry to the Nigg Post Office. He was cycling towards the post office when two men stopped him at a bridge and pulled him off

his cycle. One had a gun and the other a cutlass. They took the bag of dollars and ran away with it, and it has never been recovered. Two men named Tameshwar and Seokumar were arrested and charged with the offence. At the trial Tameshwar was called accused No. 1 and Seokumar accused No. 2, and it is convenient here to do the same. Sherry Browné gave evidence of the robbery and identified accused Nos. 1 and 2 as his assailants. A boy scout, aged twelve, gave evidence that he saw two men running away and identified them as accused Nos. 1 and 2. A barber said he saw two men running away and identified accused No. 2 as one of them. A young married woman said that she saw accused No. 1 running with a bag over his shoulder and so did a carpenter. A police sergeant named Adams gave evidence of statements made by the accused after they were arrested. Both, in their first statements, said they were not at the place at all; but accused No. 2 afterwards made a second statement in which he said that they were both there, but that he himself took no part in the actual robbery. He said: "Me get frighten and me run pon Nigg dam behind Tameshwar. Ah run behind Tameshwar, and meself and them been ah shouting 'Hold he, hold he.' " Later accused No. 2 withdrew this second statement and said it was obtained from him by threats. The defence of each of them was an alibi. Accused No. 1 said he was in a boat going to the rice field. Accused No. 2 said he was in his hammock in his living quarters.

At the end of the evidence taken in court, the jury made a request to visit the scene of the robbery and asked that the postal apprentice, the boy scout, the barber, the young married woman and the carpenter should attend. They also asked to see the living quarters of the accused. On Tuesday, February 15, 1955, the view took place. Before the jury left for the view, they were checked in the presence of the judge to see that all were there. The two accused men were there, and so were the superintendent of police and counsel for the prosecution. The judge warned the jury not to have any conversation or engage in any discussion or argument. The jury then left with the registrar, the marshal, counsel for the prosecution and counsel

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for No. 2 accused, and the police officers. The two accused were present throughout. They went to the scene of the robbery. The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police-sergeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy scout pointed out the spot where he was standing when he said he saw the two men running south. The barber pointed out the spot where he saw accused No. 2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No. 1 going south. The carpenter showed the bridge on which he was standing when he saw accused No. 1. It appears that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No. 2's alibi that he was in his hammock), showed where Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (an engine driver who lived on the same estate as the two accused) showed where he was living. A witness for the defence (who had given evidence in support of No. 1's alibi that he was in the boat) indicated the koker south of the estate. Sergeant Adams indicated the house where a witness for the prosecution named Bacchus lived.

On the next day after the view the trial was resumed before the judge in court. Sergeant Adams gave evidence of what happened at the view. Sherry Browne, the postal apprentice, was re-called so as to be offered for cross-examination by the accused, who declined the offer. The other witnesses also were available for cross-examination, but counsel for the accused did not take advantage of it. Counsel made their speeches, and the judge summed up. The jury found the prisoners guilty by a majority of 11 to 1. Each was sentenced to ten years' penal servitude and six strokes by flogging.

It is important to notice that there is no suggestion of impropriety on the part of the jury or witnesses or anybody else

at the view or any irregularity apart from the absence of the judge. No complaint was made at the trial about the absence of the judge, for the simple reason that in British Guiana for many years it has not been regarded as necessary for the judge to attend a view. It appears that in British Guiana many judges in the past have not accompanied the jury, and in a case decided in 1954 (*HASSAN MAHAMED v. THE QUEEN*) the Court of Criminal Appeal in British Guiana had held that the absence of a judge on a visit to the place was not an irregularity.

The question for our consideration is whether the absence of the judge at the view was a fatal defect in the trial. In England it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the assizes except with the consent of the prosecution. But in a case in 1847, on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but nevertheless the judge allowed a view. It was regarded as a thing of such moment that the jury were accompanied by the under sheriff, the chief constable, twenty policemen and twelve javelin men, but the judge apparently did not go with them, nor did the prisoner. It is to be noticed that there were no witnesses (see *WHALLEY* (1847) 2 Car. & K. 376). Such a view is on a par with the common case where a thing is too large or cumbrous to bring into court but is left in the yard outside. It is everyday practice for the jury in such a case to be taken to see the thing. The judge sometimes goes with them, sometimes he goes by himself. There are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a judge is not present. In a case of motor manslaughter, any member of the jury could go in the evening and look at the place by himself if he wished, without being guilty of any irregularity.

It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives

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evidence just as much as when in the witness box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene.

He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible, he will say at least: "I stood here" or "I did this," and, unless held in check, he will start to give his evidence all over again as he remembers "with advantages what [things] he did that day." But however much or however little the witness repeats his evidence or improves on it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence. Whilst giving it the witness would still be bound by the oath which he had already taken to tell the truth. If he wilfully made a demonstration material to the proceedings which he knew to be false, he would be guilty of perjury. In England the Court of Appeal has clearly held in civil cases that a view, coupled with a demonstration, is part of the evidence. So much so that if it takes place in the absence of one party without his consent the trial is bad—see *GOOLD v. EVANS AND CO.* [1951] 2 T.L.R. 1189. Or again, it may of itself outweigh all the other evidence in the case, so that the judge can found his decision on it without any more: see *BUCKINGHAM v. DAILY NEWS, LTD.* [1956] 2 Q.B. 534. Their Lordships have held likewise, in a criminal case in an appeal from British Guiana, that a view, at which witnesses gave demonstrations is part of the evidence—see *KARAMAT v. REGINAM*, 40 Cr.App.R. 13; [1956] A.C. 256.

Now if a view of this kind is part of the evidence—as their Lordships are clear that it is—it would seem to follow that it must be held in the presence of the judge. It is the very essence of a criminal trial that it must be decided on the evidence before the court and not on any outside information; and that the judge and jury must be present throughout the giving of the

evidence and every part of it, so as to be able to appreciate it and assess its worth: and throughout the speeches of counsel too. The summing-up of the evidence by an impartial judge with a trained mind is an essential part of every criminal trial: but it can only properly be done by a judge who has heard all the evidence and seen all the demonstrations by witnesses. The judge, for instance, may notice something at a demonstration which may be of vital import, but passes unnoticed by everyone else until he draws attention to it. His presence ensures not only that the proceedings are properly conducted but also that no relevant point on either side is overlooked.

Thus much has been said because there was a case in England many years ago which at first sight suggested the contrary. It is *MARTIN AND WEBB* (1872) L.R. 1 C.C.R. 378, where two men were charged with indecency in a urinal. Two policemen gave evidence of what they had seen through the bars in a wall. After the judge had summed up, the jury asked to view the place so as to see whether the policemen could have seen what they asserted. No objection was made on behalf of the prisoners. The jury had a view; the judge did not attend, nor did the prisoners. On the return of the jury to the court, without any further direction from the judge, they found the prisoners guilty. Afterwards the court was informed that the two police witnesses had gone to the view and pointed out where they had stood at the time of the alleged offence and the position in which the prisoners were standing, and that the jury had then placed themselves in the same spot and looked through the bars. A Case was therefore stated for the opinion of the court on the ground that there had been a mistrial in that (*inter alia*) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the court below into the facts of what took place at the view. The alleged reception of evidence out of court might be a mere rumour without foundation. The conviction was, therefore,

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affirmed. Their Lordships cannot regard that case as any warrant for a view to take place with witnesses in the absence of the judge. A reference to the report in 26 L.T. 778 shows that, during the argument, all the judges thought it was undesirable and some thought it was wrong; but they did not determine the point because the facts were not properly before them. Now that the point has arisen for decision, their Lordships have no hesitation in saying that it is not only undesirable but that it is wrong for a view to be had with witnesses in the absence of the judge.

Counsel for the Crown sought, however, to justify the practice in British Guiana by reference to the Criminal Law (Procedure) Ordinance of 1953 which re-enacted a provision to the like effect dating back to 1893. It said in section 45: “ (1) Where in any case it is made to appear to the court or a judge that it will be for the interests of justice that the jury who are to try or are trying the issue in the cause should have a view of any place, person, or thing connected with the cause, the court or judge may direct that view to be had in the manner and upon the terms and conditions to the court or the judge seeming proper. (2) When a view is directed to be had, the court or judge shall give any directions seeming requisite for the purpose of preventing undue communication with the jurors: provided that no breach of any of these directions shall affect the validity of the proceedings unless the court otherwise orders.”

Their Lordships think that the view primarily contemplated by that section is a simple view by a jury when no witnesses are present, such as a view of a van in the yard of the court, or of the cross-roads where a motor accident took place. But the section undoubtedly extends to cover a view when witnesses are present and demonstrate where they stood. Their Lordships so held in the recent case of *KARAMAT v. REGINAM* (*supra*). That case formed the basis for much of Mr. Le Quesne's argument. He said that the section applied alike to a view with witnesses as to a view without witnesses: and hence that if a judge need not be present at the one, he need not be present at the other.

Their Lordships do not accept this contention. Section 45 enables the court or a judge to determine the terms and conditions on which a view may be held; but this power must be exercised in accordance with the fundamental principles of a fair trial: and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case: and the tribunal is not the jury alone, but the judge and jury. Section 90 of the Ordinance says that "the trial shall be had by and before a judge of the court and a jury." If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the judge and jury. These observations do not apply to a simple view without witnesses. It is rather like their examination of an exhibit or a plan in the jury room without the judge being present, but the judge usually sees it himself too.

There remains the question whether the absence of the judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet, if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal: see *BERTRAND* (1867) L.R. 1 P.C. 520, at p. 530 and *IBRAHIM v. R.* [1914] A.C. 599, at p. 615, *per* Lord Sumner. Their Lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case, but no one could be sure that they would. If the judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure, and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might

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have noticed things which everyone else had overlooked: and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the judge was shown to have affected the result of the trial: but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass.

Appeals allowed.

Solicitors: Druces and Attlee, for the appellants; Charles Russell & Co., for the Crown.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE
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JOHN JAMES LOGAN
 TERENCE DAVID LOGAN
 EDWARD McKINNON
 MALCOLM LLOYD CALVERT

Statute—Time of Coming into Force—Army Act, 1955 (3 & 4 Eliz. 2, c. 18), s. 226 (1)—Army Act (Commencement) Order, 1955 (S.I. 1955, No. 1805).

The appellants were charged with committing “a civil offence contrary to section 70 of the Army Act, 1955, that is, assault occasioning actual bodily harm, in that they at Hong Kong on January 1, 1957, at about 02.30 hours Hong Kong standard time assaulted J. B., thereby occasioning him actual bodily harm.” Hong Kong standard time is some hours in advance of Greenwich mean time. By section 226 (1) of the Army Act, 1955, and the Army Act, 1955 (Commencement) Order, 1955, it was provided that the Act should come into force

on January 1, 1957. It was contended for the appellants that at the time when the offence was committed the Act had not come into force in Hong Kong.

Held, that the Act came into force on the day which was January 1, 1957, in the particular place where it had to be applied; that it came into force in Hong Kong on the day which was January 1 in Hong Kong; and that accordingly it was in force in Hong Kong at the time when the offence was committed.

Appeals against conviction.

The appellants, the first of whom was a corporal and the remaining three of whom were sappers in the 24th Field Engineer Regiment, were convicted by a district court martial at Hong Kong of committing a civil offence contrary to section 70 of the Army Act, 1955, that is to say, assault occasioning actual bodily harm, in that they at Hong Kong on January 1, 1957, at about 02.30 hours Hong Kong standard time assaulted Jack Brighton, thereby occasioning him actual bodily harm. John James Logan was sentenced to nine months' imprisonment and reduction to the ranks; Terence David Logan to 112 days' imprisonment; and McKinnon and Calvert each to six months' imprisonment.

Hong Kong standard time is some hours in advance of Greenwich mean time and it was contended on behalf of the appellants that the Army Act, 1955, which by virtue of section 226 (1) and the Army Act, 1955 (Commencement) Order, 1955 (S.I. 1955, No. 1805) came into force on January 1, 1957, had not yet come into force in Hong Kong at the time when the offence was committed.

David Lloyd for the appellants.

E. Garth Moore for the Crown.

THE LORD CHIEF JUSTICE: The appellants in this case were convicted before a district court martial at Hong Kong of the offence of "committing a civil offence contrary to section 70 of the Army Act, 1955, that is to say, assault occasioning actual bodily harm, in that they at Hong Kong on January 1, 1957,

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at about 02.30 hours ”—that is 2.30 a.m.—“ Hong Kong standard time assaulted Jack Brighton thereby occasioning him actual bodily harm.”

An ingenious solicitor who appeared before the court-martial persuaded them to put in the charge the exact time, 2.30 a.m., and then he took the point that, as Hong Kong time was some hours in front of Greenwich mean time, the Army Act, 1955, was not in force in Hong Kong at the time when this offence was committed. Section 226 (1) of the Army Act, 1955, and the Army Act, 1955 (Commencement) Order, 1955, provided that the Act should come into force on January 1, 1957; but the Army Act is effective not only in this country but also in any country where British troops are stationed. If troops are stationed in Hong Kong, the Army Act applies to them. If it is provided that an Act shall come into force on January 1, it comes into force on the day which is January 1 in the particular place where the Act has to be applied. I can well understand that, if an offence was committed in the Western Atlantic or somewhere of that sort, it might not be in force at the same hour as it would be in London, because the day of the offence might be December 31 in that place, but the day of this offence was January 1 in Hong Kong, and the fact that it became January 1 a few hours before the actual clock would show January 1 in England does not seem to this court to make any difference. As the Act came into force on January 1 in Hong Kong, it came into force on the day which was January 1 in Hong Kong. Therefore, this point fails and the appeal is dismissed.

Appeal dismissed.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

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KEITH ROLAND GRANT
PETER JOHN DAVIS
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Court-Martial—Mutiny—Ingredients of Offence—Collective Offence—Collective Insubordination, Defiance of or Refusal to Obey Authority Required—Army Act, 1881 (44 & 45 Vict. c. 58), s. 7 (replaced by Army Act, 1955 (3 & 4 Eliz. 2, c. 18), s. 31).

Mutiny is now a collective offence, which cannot be committed by one man. To constitute the offence there must be collective insubordination or collective defiance or disregard of authority or collective refusal to obey authority.

Appeals against conviction.

The appellants, the first two of whom were corporals and the second two of whom were privates in the Royal Army Service Corps, were convicted by a general court-martial sitting at Nicosia, Cyprus, on November 12, 1956, on a joint charge of mutiny at Platres, Cyprus, on October 1, 1956. Grant was sentenced to twelve months' imprisonment and reduction to the ranks; Davis to eight months' imprisonment and reduction to the ranks; Riley to nine months' imprisonment; and Topley to six months' imprisonment.

It was alleged that after a bed-check on the evening of October 1, 1956, at the hotel where they were billeted, members of the unit went to the hotel roof which was out of bounds, and held a meeting to discuss certain grievances. After the guard had been called out, the regimental sergeant-major was called. At his suggestion the appellant Davis, acting as spokesman for his comrades, detailed a list of the grievances

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of which they complained and the sergeant-major said that he would see the commanding officer that evening and arrange an interview with him so that the matters complained of could be considered. The sergeant-major then ordered the troops present to go to bed, and this order was complied with at once without further disturbance. Next morning a muster parade of all those who had attended the meeting on the roof was held and those who wished to complain were paraded individually before the commanding officer. Instead of being permitted to state their complaints, they were charged with failing to report a mutiny. A warrant officer called for the prosecution stated in evidence that after the bed-check he ordered the men to go to bed, but that some of them went to the roof instead; that he followed them and told them that, if they had grievances, they should follow the usual Army procedure, but that his remarks were greeted with jeers and boos and someone whom he could not identify said "Throw him down."

The appellants appealed on two grounds: (a) that the finding of guilt involved a wrong direction on a question of law; and (b) that the finding of guilt was unreasonable and could not be supported by the evidence.

Joseph Dean for the appellants Grant and Davis.

Kenneth Harington for the appellants Riley and Topley.

E. Garth Moore for the Crown.

THE LORD CHIEF JUSTICE: The appellants were convicted by a general court-martial held at Nicosia in Cyprus of the offence of mutiny, and they appeal to this court, their petition having been dismissed by the Army Council, on the ground that there was misdirection and also on the ground that the conduct, of which evidence was given, on the night in question could not amount to mutiny.

The circumstances show that there was, at any rate, a very considerable disturbance on the night in question. The men concerned were all reservists. They had been called up for service and sent out to Cyprus on account of the Middle East

crisis. The events which we are considering took place on October 1, 1956. The men had certain grievances, and on the night in question a very noisy outbreak took place in the barracks. It led, first of all, to their surrounding the sentry post and then holding a meeting on the roof of the hotel at which they were stationed. Then they came down and were certainly guilty of riotous conduct, because they proceeded to demolish the barber's shop. They received an order from a warrant officer to disperse, and they did not disperse. It is unnecessary for me to go through the whole of the long story of the events which took place, because this court has no doubt whatever that, on a proper direction by the Judge-Advocate, there was ample evidence upon which a court-martial could find that there was a mutiny that evening.

The appellants were charged under the provisions of the Army Act, 1881, because the Army Act, 1955, did not come into force till January 1, 1957. Section 7 of the Act of 1881 [replaced by section 31 of the Act of 1955] provides: "Every person subject to military law who commits any of the following offences; that is to say (1) causes or conspires with any other persons to cause any mutiny or sedition in any of His Majesty's military, naval or air forces . . . (3) joins in, or being present does not use his utmost endeavours to suppress, any mutiny or sedition in any such force as aforesaid . . . shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned." We need not consider the fact that the capital sentence may be imposed for a mutiny. Everybody knows that capital sentences may be imposed for mutiny, but no one supposes that this is a case into which such a consideration would enter. Death is the most severe sentence; but there is always power to order imprisonment or certain other punishments which are mentioned in the Act.

The first question we have to consider in this case and the question which has been principally debated here is: what is mutiny? There is no doubt that mutiny is a collective offence,

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that is to say, it cannot be committed by one man. Whatever may have been thought in the days of the Peninsular War—and there seem to be cases referred to in textbooks of some degree of authority showing that in the Peninsular War soldiers were executed for mutiny, though the acts were the acts of individuals and not a combination of individuals—there is no doubt now that mutiny is an offence which deals with collective insubordination, collective defiance or disregard of authority or refusal to obey authority. I think that view complies with the definition which is given in the Oxford Dictionary and in other works of reference.

In the *Manual of Military Law* (7th ed.), at p. 15, which sets out the practice of courts-martial and directions of Judge-Advocates to courts-martial and the rulings of Judge-Advocates—because until very recently there was no Courts-Martial Appeal Court consisting of non-military judges—the note to section 7 is: “Mutiny implies collective insubordination, or a combination of two or more persons to resist, or to induce others to resist, military authority.” Then it goes on to deal with other matters which I need not read. In point of fact there is no offence of simple insubordination provided for in any section of the Army Act, but everybody knows what insubordination means—at least I hope they do. It means refusal to subordinate one’s self to authority, and it does not follow that a mere failure to obey an order amounts to insubordination. One would not say either in military or civilian circles that that was so. A schoolboy might be told he was not to go to a certain place to buy sweets at a shop, and if he disobeyed the order it does not at all follow that he would be insubordinate or that it would be proper to call him insubordinate. So too, if a soldier was told that he was not to go to a place described as out of bounds, he might disobey the order and be guilty of disobedience, but it could hardly be said that he was insubordinate merely because he did it. If, however, he met an officer who said: “Turn back, you are going where you ought not to,” and the soldier said: “I intend to go on and I will go on,” then he is showing he will not

subordinate himself to military authority and he becomes insubordinate.

The reason why this matter is of some importance in this case is because in the course of Mr. Dean's address to the court-martial the Judge-Advocate said: "You know, Mr. Dean—I do not want to interrupt you—but I shall have to direct the court that you cannot, under the Army Act, charge men with joint insubordination. You cannot charge men jointly with insubordination because it is mutiny." Mr. Dean relies upon that as a serious misdirection. It is not necessary for us to say more than this: We could not regard that as a misdirection unless we thought it would lead the court-martial to consider that every act of disobedience, if committed by one or more men, would amount to mutiny. It is not one or more acts of disobedience which amount to mutiny. The question whether one or more acts of insubordination can amount to mutiny is quite a different matter. At any rate, we need not say more than this with regard to the actual statement that we do not think it could have led the officers who formed this court-martial to believe that a simple act of disobedience by two or more men at the same time could amount to mutiny. One has always to remember in these cases that, before a court-martial is assembled or before the charges are preferred, the matter has had to go before a convening officer of high rank. It is left to him to decide what charge shall be preferred, and I have no doubt it may often be the case that there may be some offences which could be brought into a more serious category, but the convening officer might say: "Yes, but the case is not serious enough for that." In this case the convening officer thought that the facts which were laid before him on the summary of evidence did justify a charge of mutiny, and this court cannot say that the evidence did not disclose a state of affairs which could be found to be mutiny by the court-martial if they were properly directed.

I have given the reasons why we do not think that the intervention by the Judge-Advocate during Mr. Dean's speech can

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have misled the court-martial into thinking that mere disobedience would amount to mutiny. We then have to look at the summing-up. I desire to say that, in my view, the learned Judge-Advocate summed up this case with great clarity and with very great care. I think it is a summing-up which deserves a great deal of credit. It was a long case, which had taken a great many days. Reading through the summing-up as we have done during the hearing of this appeal, we are of opinion that it shows in a very masterly manner a complete analysis of the evidence which had been given. The Judge-Advocate put forward the evidence without any bias, leaving it entirely to the court-martial to decide its value and what inferences they would draw from it. He concluded his summing-up with these words: "On that evidence, Sir, you have got to say whether you are satisfied that the purpose of these men was, as alleged by the prosecution, to get their grievances heard that night at all costs, no matter what authority were going to do about it, in which case you will probably hold that it amounted to a mutiny, or whether you are satisfied that all it was was a rather disorderly prank done with no intention of defying authority, in which case you may take the more merciful view and hold that it was not a mutiny." That, I think, put the matter as fairly as it could possibly be put and indeed very favourably to the defence. They were the last words of the Judge-Advocate which the court-martial would hear when they went out to consider their findings, and there are no words of the Judge-Advocate there which would lead the court to think that mere disobedience of an order would amount to mutiny. It was a question whether there was a defiance of authority.

I have not thought it necessary to take up time by going through the evidence in detail. The court is quite satisfied that there was evidence on which the court-martial could find on a proper direction that there was a mutiny, and it is not for us to criticise the finding provided that there was evidence on which they could come to the decision to which they came.

For the reasons I have endeavoured to state as shortly as I

can, the court is of opinion that there was no misdirection here, and that, although perhaps criticism could be made of the words the Judge-Advocate used when he made his interlocutory observation, there was here a perfectly fair direction and there was nothing said by the Judge-Advocate which could have misled the court-martial. Therefore, on all these grounds we are of opinion that the appeal should be dismissed.

Appeal dismissed.

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BEFORE

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LESLIE ARTHUR MOORE

1957
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Appeal—Notice of Abandonment—Application for Leave to Withdraw—Criminal Appeal Rules, 1908 (S.R. & O., 1908, No. 227), r. 23.

The court will not in future entertain an application for the withdrawal of a notice of abandonment of appeal unless something amounting to mistake or fraud is alleged which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity.

Application for leave to withdraw notice of abandonment of appeal.

The applicant was convicted at Hertfordshire Quarter Sessions on February 13, 1957, of shopbreaking, larceny and wounding, and was sentenced to concurrent terms of five years' imprisonment, to run concurrently with a sentence already being served. On February 21 he applied for leave to appeal and abandoned his appeal on March 5. On May 20 he applied for leave to withdraw the notice of abandonment.

No counsel appeared.

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THE LORD CHIEF JUSTICE: The applicant was convicted on February 13, 1957, at Hertfordshire Quarter Sessions of shop-breaking, larceny and wounding and received a sentence of five years' imprisonment concurrent on the different charges to run concurrently with a sentence already being served by him. On February 21 he applied for leave to appeal and abandoned his appeal on March 5. Now, by a notice dated May 20, he applies for leave to withdraw the abandonment.

The court wants to take this opportunity of saying what is their view with regard to withdrawal of notice of abandonment. The Act says nothing about prisoners who have once abandoned their appeals having a right to apply for leave to withdraw the notice of abandonment. Rule 23 of the rules, which are statutory rules, provides that on a notice of abandonment being given the appeal is deemed to be dismissed. This appeal, therefore, has accordingly been dismissed.

There have been from time to time, indeed from quite early days in the history of the court, applications for leave to withdraw a notice of abandonment, considering that by the rules, which have the force of a statute, the appeal has been dismissed. An examination of the cases has shown that the court has allowed notice of abandonment to be withdrawn only if they are satisfied that there has been some mistake, though in one case it would appear that the court thought they had a wider power: *PITMAN* (1916) 12 Cr.App.R. 14. But this was only a *dictum*. No doubt, if a case could be made out that a prisoner had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of its inherent jurisdiction would say that the notice was to be regarded as a nullity; but where there has been a deliberate abandonment of an appeal, in the opinion of the court, there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated because, the appeal having been dismissed, the court has exercised its powers over the matter and is *functus officio*. Accordingly, the court is not going to entertain applications for the withdrawal of notices of abandonment unless, as I say, something amounting

to mistake or fraud is alleged, which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity. Though I do not wish to encourage prisoners to petition the Home Office, it seems to the court that once the appeal has been dismissed, as it is dismissed when a notice of abandonment is received, the only thing a prisoner can do is to petition for the exercise of the prerogative or for the Home Secretary if he thinks right to refer the case to this court.

Therefore, this application is refused. There is no ground whatever here for saying that the notice of abandonment was given under any misapprehension or that the prisoner was misled into giving it. Therefore, we refuse to allow the notice to be withdrawn, and we hope notice will be taken of what I have said, that once a notice of abandonment has been given the appeal is dismissed and no further step can be taken in the case unless the court can be satisfied that the notice abandoning the appeal must be treated as a nullity.

I think a form of application has been printed and used called Form 9 (a), on which prisoners apply for leave to withdraw their notice of abandonment. That form has never been scheduled to the rules, and therefore has no effect because the rules provide for certain definite forms being used for certain definite purposes. This form which has been printed, I suppose by some direction at some time—we do not know when—has no force whatever, and we have given instructions for the form to be withdrawn. We feel that if there is a form distributed to prisoners giving them an opportunity to apply to withdraw their notice of abandonment, they may think they have some right under the rules or the Act to make this application. There is no such right and there is no such rule, and there should be no such form. Accordingly, that form will be withdrawn from circulation.

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Homicide—Diminished Responsibility—Burden of Proof—Direction to Jury—Homicide Act, 1957 (5 & 6 Eliz. 2, c. 11), s. 2 (1) (2).

By section 2 of the Homicide Act, 1957: “(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to killing. (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.”

Where the defence of diminished responsibility is raised, it must be pointed out to the jury that the burden on the defence of establishing that defence is not as heavy as that which rests on the prosecution to establish guilt, and that if the jury are of opinion that the balance of probability is in favour of that defence they should return a verdict of manslaughter, but that if they cannot find in the evidence material to justify the conclusion that the balance of probability is in favour of the defence, it is their duty to return a verdict of murder.

LORD ADVOCATE *v.* BRAITHWAITE, 1945 S.C.(J.) 55 followed.
CARR-BRIANT, 29 Cr.App.R. 76; [1948] K.B. 607 applied.

Appeal against conviction.

The appellant was convicted on May 16, 1957, at Newcastle-on-Tyne Assizes of capital murder and was sentenced by Ashworth J. to death.

The woman whom the appellant killed, Selina Mewes, was eighty-two years of age and very deaf. She lived alone in a house, and the appellant had previously borrowed money from her. In a statement which he made on March 6, 1957, when he gave himself up to the police, he admitted that he had got into the house during the previous night by breaking a window, and had forced the door of a back room and also the door of the room in which Mrs. Mewes was sleeping; that she then had

woken up, and, thinking that she had recognised him, he had picked up a lemonade bottle with which he had attacked her. The medical evidence showed that she must have been struck several times on the head with the bottle, and that her skull was smashed and her cheek bones broken. The appellant then had picked up several 10s. notes and ran out of the house.

At the trial the only defence was that of diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. A psychiatrist called for the defence said that the appellant was, in his opinion, a psychopath and suffering from an abnormality of mind. The prison doctors, while agreeing with some of the evidence of the psychiatrist, were definitely of opinion that the appellant was not a psychopath. The material parts of the summing-up of Ashworth J. are set out fully in the judgment.

Peter Stanley-Price, Q.C. (J. R. Johnson with him), for the appellant. The court is asked to substitute a verdict of manslaughter for that of capital murder. In view of the manner in which the burden of proving diminished responsibility is placed on the defence by section 2 (2) of the Homicide Act, 1957, the burden which the defence incurs is less than that which is required at the hands of the prosecution to prove their case beyond all reasonable doubt. The burden incurred by the defence is equivalent to the burden which rests on a party in civil proceedings. Ashworth J., however, in the course of his summing-up, said that he preferred to leave the jury with the words of the Act. That direction was not sufficient, and the jury should have received some direction on the meaning of the word "proof." The only fair reading of the summing-up is that the weight of the onus on the defence was equated with that which rests on the prosecution. In *CARR-BRIANT*, 29 Cr.App.R. 76; [1943] K.B. 607, it was held that such a direction was not correct.

Geoffrey Veale, Q.C. (J. B. Willis with him) for the Crown. When the proper direction on onus of proof has to be considered, it is very much a matter of words and emphasis. The

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Act says that it is "for the defence to prove." The defence, therefore, must satisfy the jury according to the ordinary standard of proof. One cannot have proof without satisfaction, and that is in substance what the judge said throughout his summing-up.

At the adjourned hearing on July 1, the *Attorney-General* (*Sir Reginald Manningham-Buller*, Q.C.) also appeared for the Crown.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.), for the Crown. The argument already advanced for the Crown is now abandoned, as it is not sought to support the proposition that there must be proof of diminished responsibility beyond all reasonable doubt. It is, however, submitted that, regarded as a whole, the summing-up did give an adequate direction on onus of proof. One question which arises is, what should be the direction with regard to onus of proof on the defence where the burden rests on the defence to establish a particular matter? CARR-BRIANT (*supra*), correctly interpreted, does not establish the proposition that the onus of proof of insanity or diminished responsibility is discharged by showing that there was a probability only of insanity or diminished responsibility. A preponderance of probability has to be established. It is apparent from the nature of this legislation that the intention of Parliament was to extend the law of Scotland to England, and the Scottish decision in *BRAITHWAITE*, 1945 S.C.(J.) 55 was based on balance of probability. [THE LORD CHIEF JUSTICE: The judge did not deal with balance of probability. He read the section in the Act and told the jury that he was going to leave it to them.] If that was all the judge said on the subject, the direction could not be supported, but at the very end of his summing-up he did deal with the balance of probability, because he told the jury in terms that the balance must come down in favour of the defence for the defence of diminished responsibility to succeed.

At the close of the arguments the Lord Chief Justice said that the appeal would be allowed, and a verdict of manslaughter and sentence of imprisonment for life substituted, and

- that the court would put their judgment into writing and give it at a later date.

Cur. adv. vult.

July 5. The judgment of the court was read by

THE LORD CHIEF JUSTICE: The appellant was convicted before Ashworth J. at the last assizes for Newcastle-upon-Tyne of capital murder in that on or about March 5, 1957, he murdered Selina Mewes in the course or furtherance of theft. There was no dispute that the appellant had killed the woman named and that he did so after breaking into her house for the purpose of stealing. The only defence raised was under section 2 of the Homicide Act, 1957, which provides that where a person kills another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing, this defence being generally known as one of diminished responsibility. By subsection (2) it is provided that on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder, and by subsection (3) it is provided that a person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The facts, which were, as I have said, not in dispute, were that the appellant, a young man of some twenty-four years of age, on the night in question broke into the house occupied by Mrs. Mewes, an old woman of some eighty-two years of age. He did this after discussion with a friend with whom he had been spending the evening, but who did not accompany him on his criminal enterprise. In a statement which he made the next day when he gave himself up to the police he admitted that he got into the house by breaking a window. He then forced the door of the back room, which was locked, and the door

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of the front room, in which Mrs. Mewes was sleeping. She woke up and, thinking that she had recognised him, he picked up a lemonade bottle with which he attacked her and the medical evidence showed that she must have been struck several times on the head with the bottle so that her skull was smashed and her cheek bones broken. The appellant then picked up several 10s. notes and ran out of the house. At the trial a psychiatrist was called for the defence and, although the evidence which he gave was of a somewhat vague description, he did say that the appellant, in his opinion, was a psychopath and was suffering from an abnormality of mind. The evidence of the prison doctors, while agreeing with some of the evidence that the psychiatrist had given, was that they were firmly of opinion that the appellant was not a psychopath and this issue was left to the jury by the learned judge.

The court desires to say at once that, in their opinion, no fault could be found with his charge to the jury on what constituted diminished responsibility. It is a defence which the Act has borrowed from the law of Scotland and the learned judge's direction to the jury was quite in accordance with the directions which have been given by the Lords of Justiciary, and in particular we would refer to the charge of the Lord Justice Clerk, afterwards Lord Justice General, Lord Cooper, in *LORD ADVOCATE v. BRAITHWAITE*, 1945 S.C.(J.) 55. Nor can any fault be found with the learned judge's statement of the facts. The appeal was solely based on, and the only matter discussed before us was, whether he had given a proper direction to the jury on the burden which was on the defence when setting up a plea of diminished responsibility. In addressing the jury, Mr. Stanley-Price for the defence had contended that the jury were only concerned with the balance of probabilities and that it was not for the defence to establish the defence by the same high degree of proof as that which is demanded of the prosecution in proving a criminal offence. Mr. Veale for the prosecution contended that the defence had to prove beyond reasonable doubt that the defendant came within the words of the section. He added: "They have to prove beyond any

reasonable doubt that he is within those words as a reasonable probability.”

The learned judge dealt with this matter more than once in his summing-up. Early in his summing-up he said: “Let me tell you what Parliament has said, and, after all, that is what you and I have got to go by. ‘On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.’ That is what Parliament has said: fairly and squarely the burden is placed on the defence.” A little later on and shortly before the mid-day adjournment he said: “Lastly, on this point, if you are not satisfied that he was suffering from such abnormality as I have been dealing with, then, members of the jury, you must take it from me that it is your duty to reject this defence. Something has been said about balance of probabilities and about the burden of proof and about doubt, and so on. I prefer to leave you with the simple words of the Act of Parliament, ‘... it shall be for the defence to prove’; and if it does not, the defence goes.” The Attorney-General, who intervened in this case on the appeal, conceded that in view of the decision in *CARR-BRIANT*, 29 Cr.App.R. 76; [1943] K.B. 607, this was not an adequate direction. That case, which is binding on us, decided that, where either by statute or at common law some matter is presumed against an accused person unless the contrary is proved, the jury should be directed that it is for them to decide that the contrary is proved, and that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish. This case is often cited as showing that, where an onus is placed on an accused person, it may be discharged by proving what would be enough to support a verdict in a civil action, and that, to use the words of Willes J. in *COOPER v. SLADE* (1858) 6 H.L.Cas. 746, at p. 772: “in civil cases the preponderance of probability may constitute sufficient ground for a verdict.”

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The Attorney-General, however, contended that later passages in the learned judge's summing-up corrected any wrong impression the jury might have got from the words which we have already quoted: While dealing with the evidence of Dr. Orton, the psychiatrist, he said: "The way to do it," that is to do justice, "is to look at the evidence in the light of the whole of the facts and ask yourselves quietly and soberly: 'Am I satisfied that the defence have proved that he was suffering in the way indicated?'" and his final direction to the jury was this: "The way I would direct you to consider this issue is to look, first, and form your own view about the history in the sense of what was the proper description of his working record and his after-care, and so on, and then to recall to your minds the doctors' evidence, and then to ask yourselves very carefully: 'Out of all these factors which may help to build up the picture of a psychopath, or may tend against him, where is the balance?' And, members of the jury, unless the balance is brought down in favour of abnormality the defence must fail. That is important." But the learned judge nowhere, probably because CARR-BRIANT (*supra*) was not cited to him, pointed out to the jury the difference between the onus which is on the prosecution and that which is on the defence. The last passage which, had it stood alone, might have supported the verdict was not, we think, sufficient considering the very strong directions which the learned judge had given earlier in his summing-up that the burden must rest fairly and squarely on the defence and that he would leave the question of probabilities or doubts simply in the words of the section.

We think it must be pointed out to a jury in these cases that the burden on the defence is not as heavy as the burden on the prosecution. That this is the law of Scotland as well as the law of England is clear from BRAITHWAITE's case (*supra*) which we have already cited where the Lord Justice Clerk in concluding his charge to the jury said (at p. 58): "If you think the balance of probability to be in favour of that defence, you must sustain it, and your verdict will be culpable homicide. If, on

the other hand, doing your duty fearlessly and honestly to the best of your ability, you cannot find in the evidence laid before you material to justify the conclusion that the balance of probability is in favour of this defence, then I have to tell you that it is your duty to return a verdict of murder." If that direction had been given, it is indeed highly likely, considering the somewhat vague nature of the psychiatrist's evidence and the positive evidence of the doctors called for the prosecution, that the jury would have returned the verdict which they did, but in a matter which makes a difference between a capital sentence and a sentence of imprisonment only we feel it would be undesirable for the court to consider applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and, accordingly, we have already directed that a verdict of manslaughter should be entered instead of one of capital murder and the appellant sentenced to imprisonment for life. Accordingly the appeal is allowed to that extent.

Verdict substituted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY,
MR. JUSTICE BYRNE, MR. JUSTICE SLADE
AND MR. JUSTICE DEVLIN

JOHN WILLSON VICKERS

*Homicide—Killing in Course of Furtherance of some other Offence
—Constructive Malice—Implied Malice—Intent to Do Grievous
Bodily Harm—Homicide Act, 1957.*

By section 1 (1) of the Homicide Act, 1957: "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

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Where a person kills another in the course or furtherance of another offence, in order to render the killer liable for murder it has now to be shown that, independently of the fact that he was committing another offence, the act which caused the death was done with malice aforethought, express or implied. It is now not sufficient that the killing should have been done in the course of a felony unless it is done in such a manner as would amount to murder apart from the felony. If, however, the killer in the course or furtherance of some offence other than the killing (such as burglary) has assaulted his victim intending to do him grievous bodily harm and grievous bodily harm has been inflicted by the killer from which the victim died, there is still implied malice sufficient to constitute "malice aforethought" and the killing will still be murder.

Appeal against conviction.

The appellant was convicted at Cumberland Assizes on May 23, 1957, of capital murder and was sentenced by Hinchcliffe J. to death.

The appellant broke into the shop of Miss Jane Duckett, at about 2 a.m. on April 15, clearly with the intention of stealing money. He entered the cellar and saw Miss Duckett, who was deaf and whom he had not expected to meet, coming down the stairs into the cellar. He hid behind the stairs, hoping that she would not see him, but she did see him and came at him with her hands up and scratched his face. He then hit her several times. The pathologist said that the blows were moderately severe to slight. The prosecution alleged that the appellant kicked her in the face, but that the appellant denied. There was a conflict of evidence whether, having struck her, he moved her from the cellar into the corridor, where she was found dead. The appellant then ran upstairs and searched the upstairs rooms. The material parts of the summing-up of Hinchcliffe J. are set out fully in the judgment.

D. J. Brabin, Q.C. (C. Morris Jones with him), for the appellant. The main ground of appeal is that the appellant did not have the necessary "malice aforethought" to constitute murder within the meaning of section 1 (1) of the Homicide Act, 1957. "Malice aforethought" may be express or implied.

There was formerly another conception of "malice aforethought," called constructive malice, where death resulted in the course of a commission of a felony of violence. Constructive malice was one of the forms of implied malice, but has now disappeared by virtue of section 1 (1) of the Act of 1957. Prior to the passing of that Act it was sufficient to establish malice aforethought if it were shown that the accused person committed the act which resulted in death with the intention of killing or with the intention of causing grievous bodily harm. Hinchcliffe J. directed the jury in the present case that the law in that respect had not changed and that if the appellant committed an act causing grievous bodily harm which resulted in death, intending to cause grievous bodily harm, that was still sufficient malice aforethought to constitute murder. That would have been a proper direction before the Act of 1957, but it is not now sufficient merely to say that the commission of the offence of grievous bodily harm with the intention of causing grievous bodily harm is enough to sustain a verdict of murder, as section 1 sought to abolish constructive malice. [THE LORD CHIEF JUSTICE: Do you concede that if malice for the purpose of section 1 includes an intention to do grievous bodily harm, the judge's direction was correct?] Yes, but grievous bodily harm has many different aspects. In committing the offence of causing grievous bodily harm with intent to cause grievous bodily harm, a person does not necessarily have such intent to cause grievous bodily harm as now constitutes implied malice on a charge of murder. Throughout the summing-up the judge directed the jury that it was sufficient to produce a verdict of murder if the offence of causing grievous bodily harm with intent were established. That would have been correct under the old law, but the only satisfactory direction under the new law would have been: Did the appellant use violence of such a character as would be likely to cause death?

The Attorney-General (Sir Reginald Manningham-Buller, q.c.) (Jack di V. Nahum, q.c. and D. P. Bailey with him), for the Crown. Section 1 (1) of the Act of 1957 abolished constructive malice, but specifically retained implied malice in

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the definition of “malice aforethought.” Causing grievous bodily harm which results in death with the intention of causing grievous bodily harm still amounts to implied malice, and the direction of Hinchcliffe J. was perfectly correct. It is only the fact that the act which caused death was done in the course or furtherance of some other offence—burglary, in the present case—which has to be ignored. [THE LORD CHIEF JUSTICE: Section 1 (1) will get rid, for the first time, of the anomaly by which abortion resulting in death has been treated as manslaughter. It was originally treated as murder, but the reluctance of juries to convict of murder caused first Bigham J. and later Avory J. to allow cases of abortion to be treated as manslaughter in certain circumstances. It is that type of murder—where death was caused in the course of the commission of a felony—that has been abolished by s. 1 (1).]

THE LORD CHIEF JUSTICE: The appellant was convicted before Hinchcliffe J. at the last assizes for Cumberland held at Carlisle of capital murder, the circumstances being that he, a young man of twenty-two, broke into the cottage where an elderly woman—I think she was something well over seventy and of very small stature—was living, whom he knew to be deaf. He, therefore, probably thought that he would be able to rob the house of his victim and that she would not hear him, but she did hear him or was in some way disturbed. Coming down to the cellar where he then was, she approached the appellant, who thereupon attacked her with his fists. He must have struck her a good many blows and there was evidence, which the jury evidently accepted, that he kicked her in the face and that from the injuries which she received, although the medical evidence was that they were injuries that could have been inflicted with a moderate degree of violence, she died. He was thereupon convicted of capital murder, and the capital sentence was passed.

The point that has been raised on his behalf turns entirely upon section 1 (1) of the Homicide Act, 1957. At the first hearing of the case last Monday, there being not complete

unanimity among the members of the court who heard the case, I assembled a full court of five members and I am happy to say that there is now complete unanimity in the court and the judgment I am now about to deliver is the judgment of the court and agreed to by all the members of it. I should like also to say that the court has been much indebted to Mr. Brabin for the learned and careful argument which he has put forward on behalf of the appellant. Therefore there can be no doubt that the matter has been thoroughly explored and the court is enabled to give a decision which, no doubt, will be a guidance to courts in the future. I should also like to say that, in the opinion of the court, the summing-up of Hinchcliffe J. was quite impeccable.

The point that is raised is this: Section 1 (1) of the Act provides: "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence." The marginal note of that section, which of course is not part of the section, but may be looked at as some indication of the purpose, is: "Abolition of 'constructive malice.'"

"Constructive malice" is an expression that has crept into the law—I do not think it will be found in any particular decision, but it is to be found in the text books—and is something different from implied malice. The best illustration of constructive malice which has been generally given is that, if a person causes death during the course of his carrying out a felony which involves violence, that has hitherto always amounted to murder. There may be many cases in which a man is not intending death, as, for instance, where he gives a mere push or where a person falls down and most unfortunately strikes his head or breaks his neck, although the push would never have been considered in the ordinary way as one which would cause death, yet if it was done in the course of burglary, it would hitherto have amounted to murder. Take the case of rape. If a man raped a woman and, in order to overcome her resistance,

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proceeded to strangle her, the fact that he might have used only a moderate degree of violence in the strangling, would have been no defence. It would have been murder because he caused death, if he did cause death, during the commission of the offence of rape. Another instance of constructive malice which was always held sufficient to amount to murder was the killing of a peace officer in the execution of his duty. If a prisoner was resisting arrest, although he might have used only a moderate degree of violence on a peace officer, before the Homicide Act, 1957, if he caused the death of the officer, he was guilty of murder.

Murder is killing with malice aforethought and "malice aforethought" is a term of art. "Malice aforethought" has always been defined in English law as either express malice, where an intention to kill could be inferred from a person having uttered threats against another or produced a lethal weapon and used it on his victim, or implied malice, where the prisoner inflicted grievous bodily harm by a voluntary act, and intended to harm the victim and the victim has died as the result of that grievous bodily harm. If a person does an act on another which amounts to the infliction of grievous bodily harm, he cannot say "I did not intend to go further than so-and-so." In the old cases this was said to be *malum in se* for which he must take the consequences. If he intends to inflict grievous bodily harm and the injured person dies, that has always been held in English law, and was so held at the time when this Act was passed, sufficient to supply the malice aforethought which is a necessary constituent of murder.

It will be observed that section 1 (1) preserves implied malice as well as express malice and the words "where a person kills another in the course or furtherance of some other offence" cannot, in our opinion, be referred to the infliction of the grievous bodily harm, if the case which is made against the prisoner is that he killed a person by having assaulted that person with intent to do grievous bodily harm and from the bodily harm which he inflicted that person died. The furtherance of some other offence must refer to the offence which he

was committing or endeavouring to commit other than the killing, otherwise there would be no sense in the section. It was always the law of England that, if death was caused by a person in the course of committing a felony involving violence, that was murder. Therefore, in this particular case it is perfectly clear that the words "where a person kills another in the course or furtherance of some other offence" must be attributed to the burglary which the appellant was committing. The killing was in the course or furtherance of that burglary. He killed the victim in the course of the burglary because he realised that the victim recognised him and he therefore inflicted grievous bodily harm on her, perhaps only intending to render her unconscious, but he did intend to inflict grievous bodily harm by the blows he inflicted upon her and by kicking her in the face.

The section then goes on: "the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence." It would seem clear, therefore, that what the legislature is providing is that where there is a killing, though it may be done in the course or furtherance of another offence, one must ignore that other offence. One does not take that into consideration. What have to be considered are the circumstances of the killing, and, if the killing would amount to murder by reason of the express or other malice, then the killer is guilty of capital murder. It is not enough to say that he killed in the course of a felony unless the killing is done in a manner which would amount to murder apart from the felony which is committed. It seems to the court, therefore, that here there is a case of a burglar attacking a householder to prevent recognition. The householder died as the result of blows inflicted upon her—blows or kicks or both—and if this section had not been passed, there could be no doubt that the appellant would have been guilty of murder. He is guilty of murder because he has killed a person with the necessary malice aforethought, which is implied from the fact that he intended to do grievous bodily

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harm. I will now briefly refer to the summing-up of Hinchcliffe J., which I have already said the court thinks is quite impeccable. He said to the jury: "If you are not satisfied that the charge of capital murder has been proved, that is to say, if you are in doubt whether the accused man had the intention to inflict grievous bodily harm upon Miss Duckett, it is right that in these circumstances the accused would be guilty of manslaughter, if you were satisfied that the accused had brought about the old lady's death without any malice, without any intention to do her grievous bodily harm." Again, he said: "If capital murder is not so proved and you come to the conclusion that the accused killed Miss Duckett without any malice, that is, without intending her any harm, or only trifling harm, then your verdict will be one of guilty of manslaughter"—for instance, a push to get her out of the way. Further, he said: "Murder is with the intention to kill or to do grievous bodily harm; manslaughter is an unlawful killing, but without any intention." Finally he gave this direction to the jury: "Malice will be implied if the victim was killed by a voluntary act of the accused—and here is the importance of what I am going to say—done with the intention either to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim," and "Ask yourselves: Is it proved that the accused man killed Miss Duckett with malice, that is, when he struck the blows he intended to do her serious bodily harm?"

The court desires to say quite firmly that in considering the construction of section 1 (1), it is impossible to say that the doing of grievous bodily harm is the other offence which is referred to in the first line and a half of the section. It has to be shown independently of the fact that the prisoner is committing another offence that the act which caused the death was done with malice aforethought as implied by law. The existence of express or implied malice is expressly preserved by

the Act and, in our opinion, a perfectly proper direction was given by Hinchcliffe J. to the jury, and accordingly this appeal fails and is dismissed.

Appeal dismissed.

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CIRCUIT CASE

[MIDLAND CIRCUIT]

BEFORE

MR. JUSTICE SALMON

R. v. SHARP

1957
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Procedure—Mute of Malice—Onus of Proof—Issue of Fitness to Plead and Fitness to Stand Trial One Issue—Onus of Proof of Fitness.

Trial before Salmon J. at Birmingham Assizes.

The defendant was arraigned on an indictment containing a number of counts which charged him with serious offences against young girls. On arraignment he stood mute, and a jury was sworn to try the preliminary issue whether the defendant was mute of malice or by visitation of God. After hearing argument, Salmon J. ruled that the onus was on the prosecution to prove malice and that the standard of proof was that normally resting on the prosecution in a criminal trial and not the mere balance of probabilities. The prosecution, accordingly, opened their case and called witnesses. The defence also called witnesses, and made the first address to the jury. The jury found that the defendant was mute by visitation of God.

The prosecution then contended that two further questions should be left separately to the jury (i) whether the prisoner was fit to plead and (ii) whether he was fit to stand his trial. Salmon J. ruled that there was only one issue: "Whether the prisoner is capable of pleading to and of taking his trial on the indictment," and said that he would direct the jury, as a

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matter of law that, if they found the defendant unable to communicate with his legal advisers, he was unfit to plead. He further ruled that a prisoner is usually presumed to be fit to plead, but that, if in any particular case the court has reason to doubt his fitness, it is its duty to inquire into the matter, and that the onus is then on the Crown to begin and to prove fitness. He directed that the same jury as had tried the issue of muteness should try the further issue stated above, but that as this was a different issue from that of muteness, and in fact a fresh jury could have been sworn, the evidence already given in the first issue must be re-led. Again the defence called evidence, and the prosecution had the right of the final address to the jury. The jury found that the defendant was capable of pleading to and of taking his trial on the indictment and the trial then proceeded on the general issue.

M. A. B. King-Hamilton, q.c. and H. J. Garrard for the Crown.

Bernard Gillis, q.c. and W. A. L. Allerdice for the defendant.

Solicitors: Hawley & Phoenix, Longton, for the defendant.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE
AND MR. JUSTICE GORMAN

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RUSSELL v. SMITH

Larceny—Taking—Mistake—Excess Goods Placed on Lorry—Mistake not Discovered by Driver till Goods Unloaded—Intention then Formed by Driver to appropriate Goods—Larceny Act, 1918 (6 & 7 Geo. 5, c. 50), s. 1.

The defendant was a lorry driver in the employ of a firm of cartage contractors and was sent by his employers to a factory to load a cargo of pig meal and deliver it to a merchant who had bought it. Through a mistake of which no one was aware

at the time eight sacks too many were placed on the lorry. The defendant did not discover that he had any excess of his proper load till he arrived at the merchant's premises and unloaded the cargo. He then formed the intention of appropriating the eight extra sacks, and took them away and sold them.

Held, that a person cannot "take" within the meaning of section 1 of the Larceny Act, 1916, a thing of which he has no knowledge that he is in possession; that the "taking" of the eight extra sacks occurred when the defendant first discovered that he had them in his possession; and that as at that time he had *animus furandi*, he was guilty of larceny.

HUDSON, 29 Cr.App.R. 65; [1943] K.B. 458 followed and applied.

MOYNES *v.* COOPER, 40 Cr.App.R. 20; [1956] 1 K.B. 439 distinguished.

Case stated by Somerset justices.

At Wiveliscombe Magistrates' Court an information was preferred by the prosecutor Smith charging the defendant Russell with larceny of eight $\frac{1}{2}$ cwt. sacks of pig meal. The defendant was a lorry driver in the employ of a firm of cartage contractors and was sent by his employers to the factory of a firm called Crosfields and Bodey, Ltd., there to load a cargo of pig meal and deliver it to a merchant named Jennings who had bought it from the firm. By some mistake, of which no one was aware at the time, eight sacks too many were put on to the lorry. The defendant drove the lorry to Jennings's place of business and there unloaded the sacks and then discovered for the first time that he had eight sacks too many. He thereupon formed the intention of appropriating these eight sacks and drove them away and sold them.

The justices were of opinion that there was no "taking" sufficient to amount to larceny, since at the time of the taking of the eight sacks the defendant did not then have the intent permanently to deprive the owner thereof. Accordingly, although they felt that the defendant was guilty of grave dishonesty and so stated, they dismissed the information. The prosecutor appealed.

E. L. Gardner, for the appellant.

J. A. S. Hall for the respondent.

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THE LORD CHIEF JUSTICE : This case stated by justices for the county of Somerset raises yet another difficult question in regard to the law of larceny, a law which is exceedingly technical and which has been the subject of a great many decisions. The court is indebted to Mr. Hall for a very careful argument in this case and I would also pay tribute to the magistrates who evidently tried this case with great care, applied their minds to the right points and submitted to the consideration of no fewer than fifteen cases which were cited to them, beginning in the year 1798 and going down to the year 1956. The magistrates seem to have entirely appreciated the point, which was whether there was here a felonious taking, and it is no reflection upon them that we are taking a different view from that which they took.

It is in some respects a difficult case. One of the cases which was cited to them, and which we shall have to consider, is the recent case of *MOYNES v. COOPPER*, 40 Cr.App.R. 20; [1956] 1 K.B. 439, in this court. I might recall that the learned editor of the *Law Quarterly Review* said of that case (1956) 72 *Law Quarterly Review* 183 that "*Moynes v. Cooper (supra)* served to emphasise the utter unreality of the present law of stealing. Cases such as *Moynes v. Cooper (supra)* are a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties." Those are strong words no doubt, but it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up.

Now the facts of this case are in quite a small compass. The accused, the respondent in this case, was a lorry driver in the employ of a firm of cartage contractors and he was sent by his employers to the mills or factory of a firm called Crosfields & Bodey, Ltd., there to load a cargo of pig meal and drive it to a merchant living at Crowcombe in the county of Somerset. Jennings, the merchant, had bought this pig meal from Crosfields & Bodey. Crosfields & Bodey employed the respondent's

masters to transport the goods. The respondent went to Crossfields & Bodey, and the lorry was loaded and he was standing by it or on it when it was loaded. By some mistake, probably due to a mistake in counting, eight $\frac{1}{2}$ cwt. sacks too many were put on the lorry. Nobody knew that the excess had been put on to the lorry; nobody intended that the excess should be put on to the lorry. Having got these sacks on the lorry, the respondent drove to Jennings's establishment and there unloaded them. When he unloaded them, he knew how many sacks he had got to deliver to Jennings, and Jennings knew how many sacks he was to receive. The respondent then discovered that there were eight sacks left in the lorry, because eight sacks too many had been put on it. That was the first time that he knew that he had got more sacks than he ought to have had and he thereupon formed the intention—the question is whether it was a felonious intention—of appropriating those sacks, which he did, and he took them away and sold them. When these circumstances came to light, he was charged with feloniously stealing the sacks.

The justices, having considered those facts, said: "We were of the opinion . . . that there was no 'taking' sufficient to amount to larceny since at the time of the taking of the eight $\frac{1}{2}$ cwt. sacks the respondent did not then have the intent permanently to deprive the owner thereof. Accordingly, although we felt that the respondent was guilty of grave dishonesty (as we so stated at the time) we dismissed the information." To my mind, the whole essence of the case depends upon when a man can be said to take the particular articles which he is charged with stealing. We do not, of course, throw any doubt upon the proposition that if a person takes property innocently and without any felonious intention and subsequently appropriates it to his own use, that is not, according to the present state of the law, larceny. The taking must be *animo furandi*.

The Larceny Act, 1916, which as I pointed out in the case of *MOYNES v. COOPER* (*supra*), was intended to codify not only the statute law but the common law on the subject, does not give a comprehensive definition—I dare say because it was

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impossible so to do—of the word “take.” Having given the well-known definition of larceny, which I need not read, the Larceny Act, 1916, in s. 1 (2) (i) provides: “the expression ‘takes’ includes obtaining the possession—(a) by any trick; (b) by intimidation; (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained.” That, it is to be observed, says what “taking” includes, but it may include other things. I can certainly say in favour of Mr. Hall’s argument that it cannot be said in this case that the respondent obtained possession of the goods “under a mistake on the part of the owner with knowledge on the part of the taker that possession [had] been so obtained,” because neither of them knew at the time that possession of these eight sacks had been parted with by the owners and put upon the lorry. It was not until the lorry was unloaded that the respondent became aware (Crosfields, of course, at that time were not aware) that eight too many sacks had been put upon the lorry. He then formed the intention of appropriating them, and that was the first time he could form the intention, because until that time he did not know that he had got eight more sacks than he ought to have had. It is perfectly true that he knew he had got the actual sacks but, as far as he knew when he drove off the lorry, those were the sacks that he had to deliver to Jennings. He could not, therefore, form an intention until he knew that he had got in his lorry eight more sacks than he ought to have had.

Now the facts in *MOYNES v. COOPER* (*supra*), which has been considerably canvassed in this case, were these. There was a pay clerk who had authority not only to pay wages but to calculate the wages which were due to particular employees, and she miscalculated the amount, but intended that the sum which she calculated should be given to the workman as his wages. She sent the wages in a pay packet and when the defendant received the pay packet he did not open it; he received the packet and put it in his pocket, and what he received was what the clerk intended that he should receive. It was not that the clerk put some money into the packet by mistake thinking, for instance,

. that she had put in £5 and in fact she had put in £6; she put in what she did put in deliberately, thinking that that was the amount of money that she was obliged to pay to the defendant that day, and he took it without knowing that more was in that packet than there ought to have been. Consequently we held in that case that the taking was an innocent taking, because what he took was what the clerk meant him to take, and therefore, although he acted dishonestly by misappropriating the money when he found what had happened, he was not guilty of larceny. We distinguished that case from HUDSON, 29 Cr.App.R. 65; [1943] K.B. 458, which is a decision of the Court of Criminal Appeal. Being a decision of the Court of Criminal Appeal, it is binding on this court, as indeed it would have been if it had been a decision of the Divisional Court.

The facts there were: "The appellant received a letter which was intended for someone else. He kept it for some days, and then, on opening it, he found inside a cheque, inadvertently made out in his name, which he thereupon appropriated to his own use: *Held*, that, although, when the letter was delivered to the appellant, he had no *animus furandi* with regard to the contents, he was properly convicted of larceny." He received it innocently in the sense that it came to him through the post. In giving the judgment of the court, the court considered ASHWELL'S CASE (1885) 16 Q.B.D. 190, which has always been regarded as a most unfortunate case because it was argued before fourteen judges, seven of whom decided one way and seven another. It is an instance of how one should always be careful to have an uneven number of judges in the court. The court in HUDSON (29 Cr.App.R. at p. 70; [1943] K.B. at p. 461) quoted Cave J.'s judgment in ASHWELL (*supra*) with approval, which said (at p. 203): "In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shewn. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in MERRY v. GREEN (1841) 7 M. & W. 623 was not in possession of the purse and

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money until he knew of their existence.” Stephen J. said : (at p. 216) : “ If a man picks up a purse containing money some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law.” Then the judgment goes on to deal with the particular facts in HUDSON’S CASE, 29 Cr.App.R. at p. 71; [1943] K.B. at p. 461 : “ The appellant received an envelope. What he did with it for some days was not disclosed by the evidence. Eventually he opened the envelope and he discovered the cheque, a thing which was palpably valuable and which equally palpably belonged to someone else. At that moment, for the first time, he was in a position—in which he had not been before—to form an intent. In effect, he said then and there : ‘ I am going to appropriate and take away from the owner property which he does not intend to give me and which I do not intend to return to him, but of which I do intend permanently to deprive him.’ That appears to me to come within the words of Lord Chief Justice Coleridge in ASHWELL (*supra*) where he says (at p. 225) : ‘ In good sense it seems to me he did not take it till he knew what he had got ; and when he knew what he had got, that same instant he stole it.’ That is what the appellant did in this case. As soon as he saw what he had got, he made up his mind to steal it. He then did all that was necessary for him to complete the offence of larceny.”

In my judgment, that case is applicable here and is binding upon this court. The respondent did not know what he had got until, by the emptying of the lorry at the buyer’s premises, he found he had got eight sacks too many. He was never intended to have eight sacks too many and he never intended to take

eight sacks too many. He was intending to take the consignment, which the buyer had ordered, into the possession of the buyer. When he found that he had got more than he ought to have, then for the first time he became aware of the mistake which had been made and of the addition that had been made. I do not think a man can take a thing into his possession, or come into possession, of a thing of which he has no knowledge. If somebody leaves something in my house and I do not know that he has left it, it does not seem to me that it can be said that I am in possession of that property. If it happened to be stolen goods, leaving out any question of guilty knowledge, the prosecution would surely fail at once, if it was shown that the property was left in my house without my knowledge, and that is frequently one of the points which has to be discussed by a jury in a receiving case. Very often the prisoner in a receiving case says: "I did not know the goods were there." If the driver did not know the goods were there, how can he be said to be in possession?

In giving judgment in *MOYNES v. COOPER (supra)*, I dealt with the case of *HUDSON (supra)* and I said (40 Cr.App.R. at p. 24; [1956] 1 K.B. at p. 445): "Before parting with the case, we ought to refer to *HUDSON (supra)*, on which the prosecution placed reliance. That case has been the subject of a good deal of criticism, see, for instance, Russell on *Crimes*, 10th ed. (1950), Vol. 2, pp. 1158-1161, as to whether the charge ought not to have been for obtaining an altered cheque by false pretences; the appellant had certainly been guilty of some crime. He was charged with stealing a cheque which had come to him by post and was intended for another person of a similar surname, but there was no initial either on the envelope or cheque. The accused, knowing that the cheque was not intended for him, got the drawer to insert his initial on the cheque, which he kept and cashed. This would seem to be closely akin to stealing by finding, as when he found the cheque in the envelope, he could easily have discovered the true owner. But in our opinion it is not an authority for the present case, as in

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HUDSON's case (*supra*) neither the cheque nor the envelope was intended by the sender for the accused."

That is the reason why HUDSON's case (*supra*) was decided as it was, that neither the cheque nor the envelope was intended by the sender for the accused. In this case these eight sacks were not intended to be put into the respondent's lorry; they were not intended to be delivered to the consignee when the rest of the property was delivered. I think it is very much akin to a finding. If a person by inadvertence places the sacks in the lorry, it is not very much different from having lost the sacks. In my opinion, therefore, there was a taking. The taking took place when the respondent discovered that he had got the sacks, which were never intended to be given to him and which he must have known were never intended to be given to him at all, except in the sense that they were put on the lorry by mistake.

For these reasons I think there was a taking here and the case must go back to the magistrates with a direction that an offence was committed and it is their duty to convict.

SLADE J. : I agree, and I should like to associate myself with the tribute which the Lord Chief Justice has paid to the magistrates in Somerset who formed the petty sessional court in this case, for the care with which they heard the information and with which they have stated this case. Although we are differing from them, I confess that my own mind has wavered more than once in the course of the argument, and for that I am indebted to the way in which Mr. Hall has put the argument before us. I think the case is covered by the decision of the Court of Criminal Appeal in HUDSON's case (*supra*) and I agree with my Lord's judgment and the reasons he gave.

GORMAN J. : I agree, and I do not desire to add anything.

Appeal allowed.

Solicitors: Reed & Reed, agents for Clarke, Willmott & Clarke, Taunton (for the appellant); McKenna & Co., agents for Moger, Couch & Ligertwood, Wiveliscombe (for the respondent).

[CENTRAL CRIMINAL COURT]

BEFORE

THE COMMON SERJEANT

R. v. NEW1957
June 16

Indictment—Validity—Receiving Goods obtained under Circumstances Amounting to Misdemeanour—Misdemeanour Alleged as Obtaining Credit under False Pretences or by Means of Other Fraud—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13 (1)—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 33.

An indictment which charges a prisoner with receiving goods knowing them to have been obtained under circumstances amounting to a misdemeanour under s. 13 (1) of the Debtors Act, 1869, that is, in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud, is good in law.

KUTAS (1923) 17 Cr.App.R. 179 and KLEIN (1932) 23 Cr.App.R. 173 followed.

SCHWELLER (1924) 18 Cr.App.R. 52 distinguished.

Trial before the Common Serjeant at the Central Criminal Court.

The defendant was charged on an indictment containing two counts. In the first count the Statement of Offence alleged “receiving goods obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, contrary to section 33 of the Larceny Act, 1916,” and the Particulars of Offence alleged that the defendant, between February 19, 1957, and March 9, 1957, received a record player and a wireless set, knowing them to have been obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, that is, in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud. The second count charged a similar offence.

W. E. Denny, for the defendant. The indictment should be quashed on the ground that it discloses no offence known to the

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law; SCHWELLER (1924) 18 Cr.App.R. 52. KUTAS (1923) 17 Cr.App.R. 179 and KLEIN (1932) 23 Cr.App.R. 173 can be distinguished on the ground that the judgments in those cases went further than was necessary to decide the points at issue.

J. H. Buzzard, for the Crown. It is conceded that the indictment is a novel one and that it has hitherto been thought that SCHWELLER (*supra*) was an authority against an indictment in the present form. In that case, however, the indictment was bad on the face of it because the particulars disclosed no circumstances amounting to any misdemeanour known to the law. KLEIN (*supra*), which was a later decision, expressly affirmed the decision in KUTAS (*supra*) and the reasoning in those cases is directly in point. [He referred also to MISELL (1926) 19 Cr.App.R. 109.]

THE COMMON SERJEANT ruled that the indictment was good, the point being covered by the *ratio decidendi* in KUTAS (*supra*) and KLEIN. The decision in SCHWELLER (*supra*) could clearly be explained by the fact that in the counts upon which the convictions were quashed no offence known to the law had been alleged and, therefore, the counts were bad on their face.

Solicitors: Wedlake, Saint & Co., for the defendant; The Solicitor, Metropolitan Police, for the prosecution.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE
AND MR. JUSTICE DEVLIN

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THELMA DAPHNE KINDON

*Larceny—Taking—Original Taking Tortious but not Felonious—
Prisoner Incapable through Drink of Forming Felonious Intent
—Subsequent Appropriation when Sober.*

The appellant with two other women visited the flat of one P., and during P's absence £1,100 in notes was stolen from his

desk. The appellant subsequently admitted taking the money, but at her trial for stealing £1,100 in P.'s dwelling-house put forward the defence that at the time she was under the influence of drink and drugs to such an extent as to be incapable of forming the intention of stealing. The jury acquitted her on this charge. The appellant had then gone by train to Doncaster with the two other women, and during the journey one of the other women, in whose possession the money then was, showed it to the appellant. At an hotel at Doncaster the money was shared between the three women, the appellant's share being £150. The appellant was convicted of stealing £150.

Held, that as the original taking of the money by the appellant was tortious though not felonious, and as the appellant had, on the evidence, remained continuously in joint possession of the money with the two other women, the subsequent conversion of the £150 by the appellant amounted to larceny, and she had been rightly convicted.

RILEY (1853) Dears.C.C. 149 and RUSE *v.* READ, 33 Cr.App.R. 67; [1949] 1 K.B. 377, followed and applied.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on April 3, 1957, of larceny of £150 and was sentenced by the Deputy Chairman to nine months' imprisonment.

The following statement of facts is taken, in substance, from the judgment: One Prince met the appellant and two other women named Steve and Jean Scott at about 1 a.m. on December 21, 1956, at a club, and all four persons then went to the appellant's flat, where they spent some time drinking. At about 5.20 a.m. Steve and Jean Scott left the flat, but soon afterwards telephoned to say that they could not get into their flat because they had not a key. Prince accordingly left the appellant behind in his flat, while he went with keys which he had obtained from her to take to the other two women. When he returned he found that the lights were on in his flat, that the appellant had left, that his desk had been broken open and that £1,100 was missing. The appellant made a statement to the police, and in her evidence at the trial agreed that the statement was an accurate one. She said that she had been drinking very considerably and had been taking a drug, and added:

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"I was so drunk that I don't recollect when and what time the other two girls left. All these happenings are hazy to me. I can remember, though, that the girls rang up to ask if they could have the keys to my flat, as they were locked out of theirs. What happened after that I cannot remember. The next thing I remember is being on a train. I sort of came to and wondered where we were going. I said 'where are we going?' and Jean said 'Doncaster.' Steve was also in the train with us. I said to Jean 'Why Doncaster?' and she said 'I have a sister living there.' Then Jean took me to the toilet and showed me a lot of money. That is the first recollection I have of any money being stolen." She said that they arrived at Doncaster and continued: "I felt very ill and we checked into a hotel, where I went straight to bed. Jean and Steve then went out and left me. I woke up later that same day and I noticed that the girls were back. They had been buying clothes and Steve had a new watch. Steve said 'Let's have a count,' and she put the money on to the bed and divided it up. I had about £150. Steve then had two bottles of wine brought up to our room. I was frightened about this money and I wanted to ring Bob up to ask him if he wouldn't go to the police if we brought the money back, but Steve hit me. She wouldn't let me make a 'phone call. Steve said: 'Don't be stupid, the money is probably all crooked, 'cos it's all in registered envelopes and he's probably trying to evade income tax or something.' She said, 'We haven't got all the money anyway, so we might as well have a good time, because we're bound to get done for it sooner or later.' We then got drunk and Steve played dice with me and took nearly all the money back again, because when I woke up in the morning I only had about £38 left." She ended her statement by saying, "I think I did in fact steal the money, because the girl who was living with me has since told me that on the morning of December 21, 1956, I came into our flat and dumped a lot of envelopes on the bed containing various one pound notes. She also said that Steve had put all this money into a pillow case and took it out."

Conrad Dehn, for the appellant.

Miss N. M. Collins, for the Crown.

The arguments appear fully from the judgment.

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BYRNE J. : The appellant was tried at the London Sessions before the Deputy Chairman on an indictment containing a count charging her with stealing £1,100 in a dwelling-house. The jury acquitted her on that count, but convicted her of the larceny of a sum of £150. Against that conviction she now appeals. She also appealed against sentence, but her learned counsel has withdrawn that appeal. [After stating the facts substantially as set out above, His Lordship continued :] The learned Deputy Chairman left to the jury, first of all, the question whether the appellant had stolen the £1,100 in the dwelling-house, her defence to that charge being that she was so under the influence of drink and drugs that she was incapable of forming any intention. He then left to the jury the question whether they were satisfied beyond reasonable doubt that, although she had not stolen the £1,100, she had stolen the £150 ; and he finally left to them the question, if they were not satisfied about that, whether the evidence satisfied them that she had stolen the £38. The jury convicted her of the theft of £150.

Mr. Dehn, in the course of his argument on behalf of the appellant, has cited the cases of RILEY (1853) Dears.C.C. 149 ; HUDSON, 29 Cr.App.R. 65 ; [1943] K.B. 458 ; MATTHEWS (1950) 34 Cr.App.R. 55 ; and RUSE v. READ, 33 Cr.App.R. 67 ; [1949] 1 K.B. 377. He has sought to distinguish the present case from RILEY (*supra*) on the ground that in the present case the appellant's possession was not continuous because, he alleges, the appellant had parted with the money to one of the other two women. We cannot accept that contention because, in our opinion, the evidence demonstrated conclusively that the appellant and the other two women had joint possession of the money at the material time.

That being so, what is the position ? The jury accepted the appellant's defence that she took the £1,100 from the desk in the dwelling-house at a time when she had taken drink and

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drugs to such an extent that she was incapable of forming the intention of stealing and they acquitted her on that charge, but they convicted her of stealing £150, which was her portion when the money was shared between the three women when she was sober. That being so, this case is indistinguishable from *RILEY (supra)*, which is binding on this court and which was cited in the Divisional Court case of *RUSE v. READ (supra)*. It is only necessary to refer once again to an observation made by Parke B. in the course of the argument in *RILEY (supra)* at p. 156: "The taking being a trespass, when there is the *animus furandi* it becomes a felony," and to the concluding words of the judgment of Pollock C.B. (at p. 158): "If the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animo furandi*, it is larceny." Applying those observations to this case, it becomes plain that the taking of the money from the desk in the dwelling-house, although not felonious, was tortious, and the subsequent conversion of it became larceny.

Mr. Dehn has also argued that the appellant, at the time when she took her share, took it against her will, but was compelled to accept it because the woman Steve hit her and refused to allow her to telephone. We can only conclude that the jury who heard her evidence rejected, at any rate, that part of it.

For these reasons, this appeal is dismissed.

Appeal dismissed.

Solicitors: Oswald, Horton & Smith, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE
AND MR. JUSTICE DEVLIN

FRANKLIN RUPERT McPHERSON

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Murder—Defence of Provocation—Burden of Proof.

Where on a charge of murder provocation is relied on by the defence, the jury should be directed that the onus of proving absence of provocation remains throughout on the prosecution, and that, if the jury are left in doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner.

WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr.App.R. 72; [1935] A.C. 462 followed.

LOBELL, 41 Cr.App.R. 100; [1957] 1 Q.B. 547 applied.

Appeal against conviction.

The appellant was convicted at Nottinghamshire Assizes on June 28, 1957, of capital murder and was sentenced by Hallett J. to death.

At the trial the substantial defence was that of provocation. The facts, so far as they are material, appear fully in the judgment.

W. A. Fearnley-Whittingstall, Q.C., (*A. R. M. Ellis* with him), for the appellant. In view of the decision of this court in *VICKERS* (41 Cr.App.R. 189; [1957] 2 Q.B. 547) the only ground of appeal now relied on is that the judge failed to direct the jury that, where the defence of provocation is raised, the onus is throughout on the prosecution to prove that provocation did not exist, and not on the defence to prove that it did. This has been clearly recognised as the law ever since the decision in *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS* (25 Cr.App.R. 72; [1935] A.C. 462). The judge decided that he would leave the issue of provocation to the jury, but he did not

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give them a proper direction on onus of proof, nor did he anywhere in his summing up tell them that, if the jury were left with a reasonable doubt whether there was provocation or not, the appellant was entitled to a verdict of manslaughter.

W. A. Sime, Q.C. (Niall MacDermott with him), for the Crown. The judge evidently had some doubt whether the issue of manslaughter ought to be left to the jury at all. It is true that one cannot point to any clear direction in the summing-up with regard to onus of proof on the issue of provocation, but he dealt with the whole question clearly and fairly. He never said that the onus of proof was on the defence, and the jury must have been given to understand where the onus lay.

THE LORD CHIEF JUSTICE: The appellant was convicted at the last assizes for Nottinghamshire before Hallett J. of capital murder. The case against him was shortly this: He is a Jamaican living with his sister in Nottingham. The dead man was also a Jamaican and seems to have been a man of bad character and somewhat violent and a bully. He also seems from time to time to have endeavoured to pay unwelcome attentions to the appellant's sister. The appellant said, and very likely it may be true, that he went in some fear of this man. He seems to have bought a single-barrel shotgun, and on the day before the shooting which led to the deceased man's death the appellant sawed off the barrel and he took out that dreadful weapon on April 10, concealed under his coat. The dead man came along on a bicycle and undoubtedly shouted out some provocative words to the appellant, and seems to have ridden off on his bicycle as if pursuing the sister. The sister did call out: "He is here," and thereupon the appellant produced the shotgun and fired four shots at close range at the dead man. He fired first when the dead man was standing by his bicycle, and may have fired two shots then, and the evidence is that he went up and fired two more shots into the dead man's body.

Hallett J. tried this case with the care he always displays in such matters. He gave a full direction to the jury with

regard to the law of provocation. He went through the evidence with meticulous care, and if he had held that there was no ground for leaving manslaughter to the jury, I do not think this court would have interfered. How can it be said that the appellant was acting in a gust of passion when he fired not one shot but four shots, and each shot involved the breaking of the gun to reload it and the taking out of cartridges four separate times? Greater deliberation can hardly be imagined. He had taken the gun out obviously with the purpose of firing at the dead man. He said that he only intended to frighten him. Why, then, did he have it loaded? If the gun was intended to frighten, the production of the gun would achieve that object. Further, he said that he deliberately fired low. That does not show that the provocation had such an effect on the appellant's mind as to deprive him temporarily of his reason or his self-control. He controlled himself enough, so he says, to fire at the man's legs. In all the circumstances, this court finds it exceedingly difficult to say that there was evidence of provocation at all sufficient to satisfy the law on that subject; but, in the exercise of his discretion, the learned judge did leave the question of manslaughter to the jury, and, therefore, the issue having been once left to the jury, one has to see that the jury were properly directed.

The cases have left the matter in some difficulty, though perhaps not in doubt. We know that since *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS* (25 Cr.App.R. 72; [1935] A.C. 462) the onus in a murder case is on the prosecution throughout, that is to say, the prosecution must prove that the prisoner killed the victim with malice aforethought. There are cases in which the prosecution open facts which of themselves would show provocation, and then it would be clearly for the prosecution to destroy those facts or prove other facts which would show a jury that there was not provocation in the case to reduce the offence from murder to manslaughter. But in the great majority of cases in which provocation is relied on as reducing the case to manslaughter, it is the prisoner who brings evidence to show that he was provoked, and that he acted

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under the influence of that provocation. But, as I said in giving the judgment of the court in *LOBELL*, 41 Cr.App.R. 100, at p. 104; [1957] 1 Q.B. 547, at p. 551, dealing with self-defence—and for the purpose we are now discussing there is no difference between the burden of proof in self-defence and provocation—“If an issue relating to self-defence is to be left to the jury, there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be Not Guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but none the less the onus remains on the prosecution; what it really amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdict should be Not Guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence.”

Having looked carefully through this summing-up, we cannot find that the learned judge—*per incuriam* no doubt—said to the jury: “If you are left in doubt as to whether really the prisoner was acting under provocation or not, you should find a verdict in his favour on that issue.” The case to which I

have just referred shows what the position is where the defendant is setting up a plea of self-defence or provocation, but the jury must be reminded that the onus remains throughout on the prosecution, and therefore if they are left in doubt whether or not the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner.

The case of *PRINCE*, 28 Cr.App.R. 60; [1941] 3 All E.R. 37, is to the like effect. It was a decision of this court, and the headnote in the *All England Reports* succinctly sets out the decision: "On a trial for murder, the jury should be directed that, if upon a review of all the evidence they are left in reasonable doubt as to whether, even if the prisoner's explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

The learned judge apparently was not reminded of those cases. If he had been, I have no doubt he would have given the direction which we find ought to have been given in view of the authorities. Therefore, the court has come somewhat reluctantly to the conclusion that it is their duty to set aside the verdict of capital murder and to substitute for it a verdict of manslaughter. Having taken into account the facts and the provocation which the appellant undoubtedly received, we have come to the conclusion that we can substitute a sentence of twelve years' imprisonment.

Verdict and sentence substituted.

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BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE BARRY
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CLIFFORD JAMES HODGES

Possessing Housebreaking Implements by Night—Keys—Evidence of Previously Announced Intention to Use Keys Illegally—Admissible to Rebut in Advance Defence of Lawful Excuse—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 28 (2).

The appellant was charged with being found by night in possession of implements of housebreaking, namely, two skeleton keys. He had been found by night in a garage, where, he said, he had gone to sleep with the two keys in his possession, and he further said that he had filed down one of the keys to enable him to get access to his lodgings. The prosecution called two men, who stated that about ten days previously the appellant had shown them the two keys, or two keys precisely similar, and had invited them to join him in an officebreaking enterprise.

Held, that the evidence of the two men was admissible to rebut any defence which the appellant might raise alleging that he had a lawful excuse for the possession of the two keys on the night of his arrest and had rightly been admitted on his trial.

Appeal against conviction.

The appellant was convicted at Northampton Quarter Sessions on July 8, 1957, of being in possession of housebreaking implements by night without lawful excuse, and was sentenced by the Recorder (R. E. A. Elwes, Esq., q.c.) to three years' imprisonment. He also pleaded Guilty to larceny, and was sentenced to a concurrent term of six months' imprisonment.

The appellant was found in a garage at 3 a.m. having in his possession two skeleton keys. The appellant's case was that he had found the door of the garage open and that he had gone into the garage to sleep and that he had filed down one of the keys to obtain access to his lodgings. The prosecution called two men, who stated that about ten days before his arrest the

appellant had shown to them the two keys, or two keys precisely similar, and had invited them to join him in an officebreaking enterprise, which they declined to do.

Jean M. Southworth, for the appellant. The only point raised on behalf of the appellant is that the evidence of the two men with regard to the production of the keys and to the conversation with the appellant was wrongly admitted. The only issue for the jury was whether the appellant intended to use the keys found on him for the purpose of breaking into the garage or other premises and stealing therefrom during the night on which he was arrested, and this evidence was not relevant to that issue and was highly prejudicial to the appellant.

P. Bennett, for the Crown, was not called on to argue.

BARRY J. : The appellant was convicted at Northampton Quarter Sessions of being in possession of housebreaking implements by night, and he was sentenced by the learned Recorder to three years' imprisonment. He also pleaded Guilty to a charge of larceny, for which a concurrent sentence of six months' imprisonment was passed.

He now appeals against his conviction of having in his possession without lawful excuse a housebreaking implement. The substantial, and indeed the only, ground on which this appeal is based is that the learned Recorder admitted evidence which was inadmissible. That the evidence objected to by the appellant was cogent there can be no doubt. The only question for the consideration of the court is whether or not that evidence was rightly admitted.

At about 3 a.m. the appellant entered a private garage, as he said, to get some sleep, but he inadvertently sounded the horn of a motor-car in the garage and the noise attracted the attention of a police constable, who found in an attaché case in the possession of the appellant two skeleton keys and a wet towel. The appellant pleaded Guilty to the larceny of the towel. The owner of the garage indicated that he had locked the garage door before he returned to his house, but he had,

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undoubtedly, inadvertently left his own keys in the door of the house when he went to bed, and the learned Recorder very rightly pointed out to the jury that the evidence of the householder ought to be regarded with extreme care, having regard to the fact that he was careless in relation to the keys of the house, and that the jury might take the view that he had been careless in relation to locking the garage door, which the appellant said had been open. In fact, one of the keys found on the appellant did open the side door to the garage. The appellant's explanation of his possession of the keys was that he had filed one of them down to use it to obtain access to his lodgings. No complaint is made with regard to the summing-up, and the learned Recorder put the appellant's explanations both with regard to this matter and his presence in the garage at 3 a.m. very fully and fairly to the jury.

The evidence to which objection is taken was given by two men named Gammage and Fletcher. A short time before the night on which the occurrence which gave rise to the charge took place both men were living in the same lodging-house as the appellant. They said that about ten days before the appellant had produced the two skeleton keys found on him by the police or keys similar to them, and had invited both men to join him in an officebreaking enterprise which required, according to him, three men, a motor-van and the use of a garage for a few days. They said that the appellant informed them with regard to the proposed venue, which was an office where, it was said by the appellant, £2,000 or £3,000 was in a safe during every week. There was some doubt with regard to the exact date on which that conversation took place, and it was not suggested by the prosecution that it was in pursuance of any agreement made as the result of that conversation that the appellant was in possession of the keys at the moment of his arrest. In fact, according to their evidence, Gammage and Fletcher refused to join with the appellant.

This court is clearly of opinion that that evidence was rightly admitted by the learned Recorder. The prosecution had

to prove that the appellant was in possession of a housebreaking implement at the time of his arrest by night. A key, and indeed many other objects, may be housebreaking implements and so may objects used for perfectly innocent purposes. This court is of opinion that, for the purpose of showing that in relation to the offence charged the skeleton keys were house-breaking implements, it was clearly relevant to put before the jury the conversation with Gammage and Fletcher in which the appellant was proposing to use the keys or keys exactly similar to them for the purpose of entering the office and stealing money from the safe. Consequently, in the opinion of the court, the evidence was admissible to rebut any defence raised by the appellant alleging that he had a lawful excuse for the possession of the two keys on the night on which they were found on him. It was for the jury to consider his explanation and consider whether or not he held the keys on that night with some lawful excuse. The court is unable to accept the submission made in her very clear argument by Miss Southworth that the only matter for the consideration of the jury was whether or not it was established that the appellant intended to use the keys for the purpose of breaking into the premises and stealing there between the moment of arrest and 6 a.m. on the following morning. The court is unable to accept the contention that such a narrow construction is to be placed on the wording of the statute. The statute provides that it is an offence to have housebreaking implements in one's possession without lawful excuse, and that it is for the accused person to prove that some lawful excuse for the implement found on him did exist. The excuse put forward by the appellant was very clearly explained to the jury by the learned Recorder and the jury rejected it. This court is satisfied that, to enable the jury to arrive at a conclusion whether or not an excuse existed, they were perfectly entitled to have before them the evidence of the two men, Gammage and Fletcher, whose evidence was, in the opinion of the court, clearly relevant on the point. In those circumstances the court is satisfied that the learned

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Recorder was right in admitting this evidence and, there being no complaint in relation to the summing-up, this appeal must be dismissed.

Appeal dismissed.

Solicitors: Ray & Vials, Northampton, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE BARRY
AND MR. JUSTICE HINCHCLIFFE

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ROY SPEAKE

Sentence—Diminished Responsibility—Mental Defective—Imprisonment a Sentence in Discretion of Court—Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), s. 8—Criminal Justice Act, 1948 11 & 12 Geo. 6, c. 58), s. 17.

Section 8 of the Mental Deficiency Act, 1913, which enables a court, if satisfied on medical evidence that a person convicted is a defective within the meaning of the Act, to postpone passing sentence and direct that a petition be presented by a judicial authority, or itself make any order which the judicial authority might have made on presentation of a petition, is in its terms permissive and is intended to enlarge the powers of the court when dealing with a mental defective. It in no sense restricts the court to taking one or other of the courses open to it under the section, and it is entirely within the discretion of the court whether it will exercise the powers provided by the section.

Where, therefore, the appellant, who was under twenty-one years of age, was charged with the murder of a small boy whom he had indecently assaulted, and at the trial put forward the defence of diminished responsibility under section 2 of the Homicide Act, 1957, and was accordingly convicted of manslaughter, the unanimous evidence of the doctors at the trial being that the appellant was a mental defective, but the judge passed a sentence of life imprisonment,

Held, that such a sentence was within the discretion of the judge and could not be interfered with on appeal.

Appeal against sentence.

The appellant was convicted at Herefordshire Assizes on June 12, 1957, of manslaughter, and was sentenced by Diplock J. to imprisonment for life.

The appellant, who was under twenty-one years of age, was indicted for the murder of a young boy whom he had lured to a lonely spot and indecently assaulted. When the boy said that he would tell his father the appellant had battered him to death. At the trial the appellant's defence was that of diminished responsibility under section 2 of the Homicide Act, 1957. The medical evidence was that the appellant was just on the certifiable side of the border of feeble-mindedness.

G. G. Baker, Q.C. (Conway Clifford with him), for the appellant. On the undisputed medical evidence the appellant was a mental defective, and therefore the judge should have made an order under section 8 of the Mental Deficiency Act, 1913. In any event that was the appropriate sentence, and more particularly so in the present case, as the appellant was under twenty-one years of age and, therefore, by section 17 (2) of the Criminal Justice Act, 1948, should not have been sent to prison if there was any other method of dealing with him.

R. C. Micklethwait, Q.C., and *R. V. Cusack*, for the Crown, were not called on to argue.

HILBERY J. : This appellant was convicted of manslaughter at the Herefordshire Assizes before Diplock J. and was sentenced to imprisonment for life. He is under twenty-one years of age, and he now appeals by leave of the learned single judge against his sentence.

There is really only one point argued in support of the appeal. It is a contention that, as the medical evidence by doctors before the court on the occasion of his trial was unanimously to the effect that he was a mental defective, the learned judge, in lieu of passing the sentence which he did pass, should have made an order under section 8 of the Mental Deficiency Act, 1913. Attention is called, I think, perhaps by

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way of support of the argument rather than as a second point, to section 17 (2) of the Criminal Justice Act, 1948.

All I need mention of the circumstances of the case is that the appellant had lured a young boy to a lonely spot, had indecently assaulted him, and when the boy said he would tell his father, had brutally battered him to death. There is one other point to be mentioned. The appellant had been convicted in November, 1956, of arson. At his trial then there was a conflict of medical evidence on which side of the borderline of certifiable feeble-mindedness he fell. In the result it was considered on the balance of medical evidence that he was not certifiable as a feeble-minded person, and he was put on probation. It was while he was on probation that he killed the small boy.

In our view, there is nothing in the point which is argued in support of this appeal. The learned judge considered the evidence that was before him. The jury on the evidence came down on the side of finding that he was a person with diminished mental responsibility and that the conviction ought to be for manslaughter and not murder, and he was convicted, therefore, of manslaughter. But it is argued that their finding was tantamount to their being satisfied that the appellant was a mental defective and certifiable. We are unable to take that view. Under a perfectly proper direction the jury considered whether on the medical evidence they were satisfied on balance that the appellant was a person who should be regarded as of diminished mental responsibility, and, finding that he was such a person, they found him guilty of manslaughter. That did not mean that they had formed the view that he was a certifiable mental defective.

The learned judge took the view, and he has reported, that the medical evidence before him was that the appellant was just on the certifiable side of the border of feeble-mindedness: "The only ground for the change of opinion of those doctors who had changed their minds since November last was the fact that he had committed this new crime. I gathered that, as disclosed by ordinary I.Q. tests, etc., there was little or no difference

between his mental condition now and last November when he was regarded as not being certifiable." It was in those circumstances that the learned judge, in passing sentence, said: "This is a case where it seems to me there is only one course which it is proper for me to take for the protection of the public and of little boys like the one that you have killed. The sentence of the court is that of life imprisonment."

In our view, it is quite clear that section 17 of the Criminal Justice Act, 1948, leaves it open to a court when dealing with a person under twenty-one to imprison him if the court thinks right and, if it be an assize court, it is not necessary for the court to give its reasons for so dealing with him; but the court has to take into account any information before it which is relevant with regard to his character, his physical and mental condition, and it is not for a moment contended that the learned judge did otherwise than take into account matters in reference to the appellant's physical and mental condition. So far, therefore, as section 17 is concerned, the course pursued by the learned judge at the trial was impeccable. When it is argued, as I understand it now is, that the unanimous evidence of the doctors at the trial being to the effect that the appellant was a mental defective, the judge was bound to take one of the courses open to the court under section 8 of the Mental Deficiency Act, 1913, that is to argue something which is completely counter to the express terms of that section. That section enlarges the powers of a court in certain circumstances which in terms are these: "On the conviction by a court of competent jurisdiction of any person of any criminal offence punishable in the case of an adult with . . . imprisonment, . . . the court, if satisfied on medical evidence that he is a defective within the meaning of this Act, may either (a) postpone passing sentence . . . and direct that a petition be presented," etc., or " (b) in lieu of passing sentence . . . itself make any order which if a petition had been duly presented under this Act the judicial authority might have made. . . ."

That section is in terms, therefore, permissive and is intended to enlarge the powers of the court when dealing with

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a person convicted of a criminal offence punishable in the case of an adult by imprisonment and shown to be a mental defective. It in no sense restricts the court to taking that course and indeed not only is the word "may" permissive, but in subsection (b) it is to be observed that it is said to be a course that may be taken "in lieu of passing sentence." Nothing could give a clearer indication that it is entirely in the discretion of the learned judge at the trial, where the circumstances are such that he could exercise the powers under that section, to decide whether he will do so. In our view, there is nothing in this appeal, and it is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

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JOSEPH WILSON

*Retirement of Jury—Return with Request for Further Evidence—
Duty of Judge—Witness Re-called—Conviction Quashed.*

If the jury after retirement put a question to the court with regard to the evidence, it is the duty of the judge to tell them, if it is the fact, that no evidence on the point has been given and that they must take it that there is no evidence on the point, but if the question relates to a point on which evidence has been given, the judge should remind them of the evidence. The principle that, once the summing-up is concluded, no further evidence ought to be given, must be maintained in every case, and, if further evidence is allowed at that stage, even on a matter which appears to the Court of Criminal Appeal irrelevant, the conviction will be quashed.

OWEN, 36 Cr.App.R. 15; [1952] 2 Q.B. 362, followed and applied.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on May 20, 1957, of pavilion breaking with intent and possessing housebreaking implements by night and was sentenced by the Deputy Chairman (Henry Elam, Esq.) to three years' imprisonment.

The premises alleged to have been broken into were a cinema. Among the witnesses for the prosecution was a Miss Lloyd, the secretary and cashier of the cinema. She said that on the particular evening she left the cinema with an employee named Woodger (who was indicted together with the appellant) and two other employees and that she saw Woodger go through the motions of locking the door and noticed the appellant and another man standing at the corner. She said that, after having had coffee with the two other employees, they all returned to the cinema. On the conclusion of the summing-up the jury retired and later returned into court with the question : " Why did Miss Lloyd go back ? What was her reason for going back ? " The Deputy Chairman decided to recall Miss Lloyd, who then said that she had gone back because she had seen some suspicious people hanging about and a chain in the boiler room had been previously broken.

R. N. Titheridge, for the appellant. In recalling Miss Lloyd to give further evidence after the jury had retired, the Deputy Chairman departed from what must now be regarded as the established rule of procedure : OWEN, 36 Cr.App.R. 16 ; [1952] 2 Q.B. 362.

D. A. Hollis, for the Crown. It is conceded that in the introduction of fresh evidence after the retirement of the jury there was a departure from the proper rules of procedure, but it is submitted that the evidence which the jury had already heard was overwhelming and that the further evidence of Miss Lloyd cannot have affected their minds. The court is accordingly asked to consider whether this is not a case in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, applies. The

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case is different from that of OWEN (*supra*), where the additional evidence may well have led the jury into deciding to convict.

THE LORD CHIEF JUSTICE: The appellant was convicted at the County of London Sessions before the learned Deputy Chairman, Mr. Elam, of pavilion breaking with intent and possessing housebreaking implements by night. He was indicted along with another man of the name of Woodger.

The case was one of the clearest possible description. A cinema was broken into and the appellant was found in the cinema, and the various statements which he made to the police showed that he was a participant with Woodger and was as guilty as he could be. I cannot see, having read through the summing-up of the learned Deputy Chairman and the statements that have been made, that in the witness-box he suggested that he had any defence at all; at any rate, it is very difficult to see what defence he suggested. Among the evidence that was given was that given by a young woman, Miss Lloyd, the secretary and cashier of the cinema. She said that on the particular evening she left the cinema at 11 o'clock with Woodger, who was employed there, and two other employees. She said that she saw Woodger go through the motions of locking the door and she noticed the appellant and another man standing at the corner. After having some coffee with the two other employees, she and they returned to the cinema because she thought there were suspicious persons hanging about and a chain in the boiler room had previously been found broken. In her evidence she simply said that she returned to the cinema after they had had coffee.

The case was so clear that one cannot understand the jury having the smallest hesitation in convicting, but, after they had been out some time, they came back and said they had a question to ask, and the question they put to the Deputy Chairman was: "Why did Miss Lloyd go back? What was her reason for going back?" The learned Deputy Chairman seemed to think that there was some danger in recalling Miss Lloyd,

but he decided to do so. It was then that Miss Lloyd said she went back because she had seen some suspicious people hanging about and a chain in the boiler room had been previously broken. Why the jury wanted to ask such an irrelevant question, one does not know. The right course for the Deputy Chairman would have been to say: "You have heard the evidence, and we cannot have any more evidence"; but he did allow Miss Lloyd to be recalled and certain questions were put to her which do not seem to me to have advanced or retarded the case one iota.

This court has laid down in OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362, that once the summing-up is concluded and the jury are sent out to consider their verdict, no further evidence can be given. We said that in perfectly clear terms. We have said (36 Cr.App.R. at p. 21; [1952] 2 Q.B. at p. 368) that if the jury ask a question, the right thing "is for the judge to tell the jury, if it is the fact, that no evidence on the point has been given and they must take it, therefore, that there is no evidence upon it, though, of course, if they ask a question upon which evidence has been given, it is quite right for the judge to remind the jury of the evidence. We think this is the only safe practice, and it ought to be followed. The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that whether it might have been given by one of the witnesses already called or whether it would necessitate, as in *R. v. BROWNE* (1943) 29 Cr.App.R. 106, the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put upon it."

It is perfectly true that in OWEN's case (*supra*) the question which the jury put was a most pertinent question on a matter which they wanted cleared up, and if it had been answered in one way would almost certainly have resulted in the prisoner being found not guilty. It was answered in the contrary sense

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and the jury found a verdict of guilty. We quashed the conviction for the reason that the witness was recalled after the close of the case, after the summing-up, and we further said in OWEN's case, 36 Cr.App.R. at p. 22; [1952] 2 Q.B. at p. 369: "We think it right to lay down that once the summing-up is concluded, no further evidence ought to be given. The jury can be instructed in reply to any question they may put on any matter on which evidence has been given, but no further evidence should be allowed."

In this case, it seems to the court that there was a departure from that rule which this court has laid down. We cannot speculate why the jury asked this apparently irrelevant question, but we must assume that some of the jury had a point in their minds which they wanted cleared up and which the evidence given had not cleared up, and that they had not been satisfied by the evidence given. It seems to us that the maintenance of the principle laid down in OWEN's case (*supra*) is more important than the result of this particular case. If we had power to order a new trial, this is obviously a case in which we should do so, because the result of this appeal is that a man who is obviously guilty and has several previous convictions, including a sentence of corrective training, gets released because of this unfortunate mistake which was made in the court below. We think that we are bound to uphold the principle laid down in OWEN's case (*supra*), and that if we were to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, it would be in effect over-ruling OWEN's case (*supra*).

For these reasons, with great reluctance, there being no merits on the part of the appellant, the conviction must be quashed.

Conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY,
MR. JUSTICE BYRNE, MR. JUSTICE FINNEMORE
AND MR. JUSTICE DONOVAN

WILLIAM EDGAR HOPKINS
HERBERT JAMES COLLINS

1957
Oct. 11

Forgery—Cash Book—Omission of Entry which should have been Made—Forgery Act, 1913 (8 & 4 Geo. 5, c. 27), s. 1 (1), (2)—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 35 (1).

Although the insertion of false entries in a cash book with regard to amounts received or paid out or the fraudulent alteration of entries properly made clearly amount to forgery of the cash book within the meaning of section 1 of the Forgery Act, 1913, the question whether the mere omission of an entry which ought to have been made can amount to forgery still remains open.

Appeals against conviction.

The appellants were convicted at Somerset Quarter Sessions on May 6, 1957, of fraudulent conversion and forgery and were sentenced by the chairman: on the charges of fraudulent conversion, Hopkins to fifteen months and other concurrent terms of imprisonment, and Collins to 12 months and other concurrent terms of imprisonment; on the charges of forgery, each to nine months' imprisonment concurrent with the other sentences.

The appellants were respectively secretary and treasurer of Wells Football Supporters' Club. Moneys were paid to one or other of the appellants from time to time, which they were alleged to have fraudulently converted. The charges of forgery arose in connection with a cash book belonging to the club.

On October 3, 1957, the court—The Lord Chief Justice, Mr. Justice Hilbery and Mr. Justice Donovan—dismissed the appeals on the convictions of fraudulent conversion, but reserved for a court of five judges the question of the validity of the convictions of forgery.

Anthony Cox, for the appellant Collins. An inaccurate statement made in a cash book does not amount to forgery

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within the definition contained in section 1 of the Forgery Act, 1913. That Act was not intended to alter, and did not alter, the character of the offence at common law. At common law the alteration of a document did not amount to forgery unless the character of the document was changed by the alteration: *WINDSOR, Re* (1865) 6 B. & S. 522. Here the character of the cash book which was the basis of the charges of forgery was not altered by inaccurate entries made in the book or by any omission from it.

John Whitley, for the appellant Hopkins. The appropriate charges to cover the offences now alleged to amount to forgery were charges of falsification of accounts. The Falsification of Accounts Act, 1875, was passed for the specific purpose of filling up an omission which was thought to exist in the law of forgery. If the court were to hold that an omission to make the entries which it is said should have been made in the present case amounted to forgery, then every case of falsification of accounts would amount to forgery.

J. Scott Henderson, Q.C. (*C. F. Ingle* with him), who was called on on this point only. An omission to record an entry which should have been made in an account book may amount to forgery, and could be so in the circumstances of the present case.

THE LORD CHIEF JUSTICE: The two appellants were convicted at Somerset Quarter Sessions on an indictment which charged them, first, with the fraudulent conversion of various sums of money and, secondly, with certain forgeries.

The facts necessary to be stated, which can be stated exceedingly shortly, were that these two men were the secretary and the treasurer of one of the football supporters' clubs which enable funds to be raised to assist the local football team. Various activities, such as dances, whist drives and pools, were held, and the money was paid to one or other of the men from time to time, and the charge against them was that they had fraudulently converted the money to their own use. Charges of forgery were also made.

We were told on the last hearing that the reason why the charges were not preferred under the Falsification of Accounts Act, 1875, but the Forgery Act, 1913, was because there was a doubt whether the Falsification of Accounts Act applied. Considering that the Falsification of Accounts Act applies to falsification by a clerk, servant or officer, I have some difficulty in seeing why we have had to have this very elaborate discussion about forgery, because I should have thought the treasurer and secretary were at least officers of the club. However, the charge of forgery was made, and we have to decide the point.

A careful argument was addressed to the court by Mr. Cox on behalf of the appellants and last week we dismissed the appeal so far as the charges of fraudulent conversion were concerned, but in view of the argument Mr. Cox put forward and the authorities cited, we thought that a somewhat difficult point was raised and that we had better have a full court to decide the question whether in this case the circumstances amounted to forgery.

So far as the facts on this part of the case are concerned, it is enough to say this: The appellants had a book or books, and it was proved and the jury accepted that they did not make true entries of the amounts they received from the various agents who went round to people in Wells and induced them to subscribe to the Wells Football Supporters' Club. The agents, who were not paid agents, collected money and handed it to the two appellants. The chairman pointed out to the jury they must be satisfied that the appellants were acting conjointly, that sums of money were handed to them and that they made in the books false entries with regard to the amount of money they had received. They entered that they had received a certain amount when they had received more. Then, on the other side, they put in false entries with regard to the amounts which they had paid out. When one examines the books, one can find various entries which were proved by the evidence of the agents, many of whom were called, to be false, and one has only to look at the books to see that a great many entries on

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the other side had been altered, so again that side was shown to be false.

The jury having convicted on these matters, Mr. Cox submitted to the court that the offence amounted only to falsification of accounts, with which the appellants were not charged, and did not amount to forgery. He supported that argument by old cases, more especially the case of *WINDSOR, Re* (1865) 6 B. & S. 522, but in the opinion of the court we are only concerned now with the Forgery Act, 1913, as amended by the Criminal Justice Act, 1925, because forgery is a statutory offence. Parliament has laid down in the clearest possible way what amounts to forgery. The Act starts in section 1 by saying: “(1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine.” I think the prevalent opinion of the court is that if a man has a cash book and proceeds to make false entries in it so that it does not represent the truth and does not represent what he received and what he paid out, that book is a false document, and it is made false by the person who keeps it.

The section then goes on to provide in subsection (2) “A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein. . . .”

Again, in 1925, on account of it having been held in a case that the section was exhaustive and unless the matter could be brought within the words “whether by addition, insertion, obliteration, erasure, removal, or otherwise,” it could not be said that the document was false, it was provided by section

35 (1) of the Criminal Justice Act, 1925: "For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in subsection (2) of section 1 of that Act." But I do not think it is necessary to have recourse to that Act for the purpose of this case. We are not dealing with a case where no entry is made, and, as we are not dealing with a case where no entry is made, perhaps it is just as well that the court should not express an opinion whether it is forgery if an entry which should have been made is left out. For the purpose of this case it has been proved that the appellants made false entries, writing in that they had received so much money when in fact they had received so much more and that on the other side they had altered sums. Now that we have seen the books, the difficulties which the court felt have been cleared up, because one can see in the plainest way that totals and individual items have been altered, with the result that that document gives a wholly false impression of the amount that ought to have been in the hands of the appellants.

For these reasons, although an indictment might have been preferred under the Falsification of Accounts Act, the court has come to the conclusion that the facts which were proved here and which must have been accepted by the jury clearly fall within the words of the Forgery Act, 1913. What might have been the position at common law, it is not necessary for us to discuss. Forgery no longer depends on the common law, nor does it depend on the Forgery Act, 1830 (rep.), or many other statutes which have been passed from time to time. It depends simply on the statute of 1913 and, in the opinion of the court, this case clearly falls within it. We pointed out at the last hearing that, whatever happened here, there would be no difference in the sentence, and there is no appeal against sentence. Accordingly, the appeals are dismissed.

Appeals dismissed.

Solicitors: F. S. & R. A. Ingle, Bath, for the Crown.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
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BERNARD ISAIAH THOMAS

1957
Oct. 7, 21

Evidence—Character of Prisoner—Abstract of Indictment with List of Previous Convictions Attached Handed to Jury—List of Convictions Not Seen by Jury—Colloquy between Prisoner and Judge—Proviso Applied—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).

During the course of a trial an abstract of the indictment to which a list of the previous convictions of the prisoner was attached was handed to the jury. The jury did not actually see the page on which the list of previous convictions appeared. The prisoner asked the judge if he could be allowed to see the document, which the judge permitted him to do. The judge said: "Nothing that appears on page 4 [where the convictions were set out] is relevant for the present purposes and if I had any idea they had seen what was on there, this case would have had to be tried again by another jury. . . . What is on that sheet is no concern of the jury, and they will never know anything about it until after they have returned their verdict. That I shall be careful of. If they had known about it, I should have had to take a different step, and the less we say about it the better."

Held, that even if as a result of the above colloquy between the judge and the prisoner the jury had come to suspect that the prisoner had previous convictions, in view of the overwhelming nature of the evidence against the prisoner, there had been no substantial miscarriage of justice and in accordance with the proviso to section 4 (1) of the Criminal Appeal Act, 1907, the court would not interfere with the conviction.

FLOWER (1956) 40 Cr.App.R. 189 distinguished.

Application for leave to appeal against conviction.

The applicant was convicted at Leicester Assizes on May 30, 1957, of obtaining property by false pretences, fraudulent conversion and obtaining credit without disclosing that he was an undischarged bankrupt and was sentenced by Hallett J. to four years' imprisonment and one year's imprisonment (concurrent).

The applicant conducted his own defence, and the trial lasted seven days. On the second day of the trial, the jury were handed an abstract of the indictment consisting of four pages. On the fourth page was a list of the applicant's previous convictions. On the attention of the judge being drawn to the matter by counsel for the prosecution, the judge asked the jury to return the document and satisfied himself that they had not looked beyond page 3 and had not seen page 4. The applicant asked: "May I see the document at some time?" and the judge replied: "You may see the fourth page, certainly. Nothing that appears on page 4 is relevant for the present purposes and, if I had any idea they had seen what was on there, this case would have had to be tried again by another jury." The applicant: "According to this information, I am very concerned with the information passing——" The judge: "You had better be careful what you say. What is on that sheet is no concern of the jury and they will never know anything about it until after they have returned their verdict. That I shall be careful of. If they had known about it, I should have had to take a different step, and the less we say about it the better." The trial then proceeded without any further discussion of the matter.

W. A. L. Raeburn, Q.C. (Henry Harris with him), for the applicant. The only point in this application is whether the discussion which took place between the judge and the applicant in the presence of the jury unmistakably brought to the notice of the jury the fact that the applicant had previous convictions and it is submitted that the phrase "they will never know anything about it until after they have returned their verdict" must have had that effect. A similar point arose in the recent case of *FLOWER* (1956) 40 Cr.App.R. 189, where an indictment with a list of previous convictions attached was handed to the jury, but there it was established that the jury had seen the list of convictions.

[THE LORD CHIEF JUSTICE: The main point in that case was whether the prisoner had stolen a car or merely driven it away

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without consent. If the jury had studied the list of convictions, there was a great likelihood that they would say that the prisoner was a persistent thief. That cannot be so in this case.]

[HILBERY J.: We must accept the statement of the judge that the jury in the present case did not see the list. You must argue on the basis that the remarks of the judge necessarily conveyed to any member of the jury who knew something about a trial that page 4 contained a list of previous convictions.]

The statement that the jury would know nothing about it until after they had returned their verdict can have had no other implication.

No counsel appeared for the Crown.

At the conclusion of the argument Donovan J., giving the decision of the court, said that the application would be refused, but in view of the importance of the matter and the existence of the earlier authority to which the attention of the court had been drawn, the court would put its reasons into writing for delivery at an early date.

Cur. adv. vult.

October 21. The judgment of the court was read by

DONOVAN J.: We now proceed to give our reasons for refusing this applicant leave to appeal.

He was convicted at Leicester Assizes in May last of various offences of false pretences, fraudulent conversion, and obtaining credit without disclosing that he was an undischarged bankrupt, and was sentenced by Hallett J. to four years' imprisonment in all. He conducted his own defence. The case was begun on Thursday, May 23. The summing-up began on May 29 and concluded on May 30. The jury considered their verdict for twenty-seven minutes before finding the prisoner guilty on all counts. On the second day of this seven-day trial the jury was handed an abstract of the indictment. It consisted of four pages, and on the fourth page were particulars of the prisoner's previous convictions. Counsel for the prosecution, when the fact came to his notice, very properly drew the

attention of the learned judge to the matter. The learned judge then asked the jury to return the document to him saying: "You have given it back to me open at page 3; may I take it you did not turn on to the next page?" to which the foreman of the jury replied: "I had charge of the document and I did not look at page 4." The prisoner then asked to see the document and the learned judge said to him: "They have satisfied me they have not seen it. The document was given to one member of the jury and I observed where he opened it—to the count we were dealing with, which was count eight on the third page. I observed he had not turned over to the next page, and he assures me he did not do so. I think I am entitled to act upon that, as it confirms both my own observation and that of counsel prosecuting. What was on page 4 was a matter they ought not to have seen." The prisoner: "May I see the document at some time?" Hallett J.: "You may see the fourth page, certainly. Nothing that appears on page 4 is relevant for the present purposes and if I had any idea they had seen what was on there this case would have had to be tried again by another jury." The prisoner: "According to this information, I am very concerned with the information passing —" Hallett J.: "You had better be careful what you say. What is on that sheet is no concern of the jury, and they will never know anything about it until after they have returned their verdict. That I shall be careful of. If they had known about it, I should have had to take a different step, and the less we say about it the better." The trial then proceeded without further discussion of the matter and concluded some six days later.

The applicant now contends that, accepting that the jury did not see page 4 of the abstract, nevertheless the replies of the learned judge above set out must have caused the jury to suspect that he had previously been convicted; and as he did not put his character in issue, that the conviction should accordingly be quashed. He stresses particularly the remark: "They will never know anything about it until after they have returned their verdict."

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One cannot, of course, be sure what significance the jury attached to this remark. As laymen there were other conclusions they might have drawn, for example, that page 4 simply recited his antecedents without there being any previous convictions, or that it referred to further charges to be preferred against the prisoner and tried on the conclusion of the present case, if need be. On the other hand it may be that one or more of the jury suspected, as a result of the colloquy between the learned judge and the prisoner, that the prisoner had previous convictions. Assuming for the moment the existence of such a suspicion, the question would obviously arise on any appeal whether the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, for the case against the prisoner was overwhelming. It was argued that the court should not do so, having regard to the decision in FLOWER'S case (1956) 40 Cr.App.R. 189. There the jury were handed the indictment and retired with it in their possession. On the back of it appeared the prisoner's previous convictions. There could hardly be room for doubt, therefore, in that case, that the jury knew of them before arriving at its verdict. The conviction was quashed; and though the court apparently thought there was no miscarriage of justice, there is no discussion in the judgment as to applying the proviso to section 4 (1). In fact it was not applied.

On the other hand in the recent but unreported case of ALFRED VELLO SMITH (1956) a somewhat similar situation arose. There the appellant was tried at Essex Quarter Sessions on a charge of receiving stolen property, and did not put his character in issue. Three other men tried with him at the same time did so. Two of these three had previously been convicted and accordingly their previous convictions were put to them. In summing up the chairman, *per incuriam*, said to the jury: "The defendant Hilton is brought before you as a person of clean, upright and sound character. Unfortunately, in a way, the other defendants are brought before you as persons who have been in trouble before." This should not have been said of Vello Smith who had previous convictions, but who had not

put his character in issue. It was not certain whether the jury in fact drew an inference from this remark adverse to Vello Smith, but the Lord Chief Justice, giving the judgment of the court, dismissing Vello Smith's appeal on the point said this: ". . . the case was an overwhelming one, and if we thought the point ought to be decided in favour of the prisoner, it is certainly a case in which we should apply the proviso."

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There are two earlier similar cases, one where the court applied the proviso and one where it did not: see WILLIAMS AND WOODLEY (1920) 14 Cr.App.R. 135, and LANE (1920) 15 Cr.App.R. 26. There is thus no hard and fast rule upon the matter. Each case has to be separately considered. In the present case, if we were to conclude that the jury suspected from what was said that the applicant had previous convictions, we should certainly apply the proviso. The application for leave to appeal was accordingly refused.

Application refused.

Solicitors: Lesser & Co., for the applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN
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NICHOLAS KILEY

1957
Oct. 28

Central Criminal Court—Necessity for Presence of Two Commissioners—Departure of Alderman through Misunderstanding—Judge Sitting Alone for Twenty Minutes—Immaterial Evidence Given—Proviso Applied—Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), ss. 1, 2—Criminal Appeal Act, 1907 (17 Edw. 7, c. 23), s. 4 (1).

Section 2 of the Central Criminal Court Act, 1834, gives power to the justices and judges of the Central Criminal Court, or any two or more of them, to inquire of, hear, determine and adjudge all crimes within the Central Criminal Court district.

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A judge at the Central Criminal Court, after the other courts had risen, rose for an adjournment, and the alderman, who had been present in the building during the afternoon as the second commissioner required under the above section, believing that the judge had risen for the day left the building. The judge resumed the hearing after the departure of the alderman, and continued to sit for about twenty minutes, but was then informed of the position and rose. During the twenty minutes the cross-examination of a Crown witness continued, but nothing material arose. It was contended that the absence of the alderman from the precincts of the court during part of the trial rendered the trial invalid.

Held, that assuming that the alderman had necessarily to be in the precincts of the court during the time when the evidence above referred to was given, the result was that inadmissible evidence had been given, but that as, in the opinion of the court, the admission of that evidence had not led to any substantial miscarriage of justice, the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and dismiss the appeal.

Reference by the Secretary of State for Home Affairs under section 19 (a) of the Criminal Appeal Act, 1907.

The appellant was convicted at the Central Criminal Court on February 19, 1953, of robbery with violence and was sentenced by the Commissioner (Sir Ernest Goodman Roberts) to six years' imprisonment.

On the first day of the trial, February 16, 1953, three other courts had been sitting and these rose at about 4 p.m. At 4.6 p.m. the Commissioner announced that he would adjourn for ten minutes then resume. Up till this time an alderman had been present in the building, but then left, believing that the Commissioner had risen for the day. The Commissioner resumed at about 4.20 p.m. and sat till 4.40 p.m., when an usher informed him that the alderman had left the building. The Commissioner then rose. During the twenty minutes between 4.20 p.m. and 4.40 p.m. a witness, who purported to identify the appellant as one of a number of men who had taken part in what proved to be a rehearsal of the robbery in the street, was cross-examined, but nothing material arose out of the cross-examination.

David Weitzman, Q.C. (S. Lincoln with him), for the appellant. The usual procedure at the Central Criminal Court is for the judge at the beginning of each day's sitting to enter the court accompanied by an alderman, who is the alderman on the rota for the day. It is the duty of that alderman to remain within the precincts of the court until the judge rises at the end of the day's sittings. Here the alderman left before that time and the judge was, therefore, trying a case without the presence of another Commissioner in the building. This was contrary to the provisions of section 2 of the Central Criminal Court Act, 1834, and rendered the trial a nullity.

Christmas Humphreys, for the Crown. The evidence that was given during the absence of the alderman was quite immaterial, and even if that evidence was rendered inadmissible by the provisions of section 2 of the Act of 1834, it cannot have affected the verdict. There cannot, therefore, have been any miscarriage of justice.

THE LORD CHIEF JUSTICE: This is an appeal arising out of a reference made by the Secretary of State, to whom the appellant addressed a petition complaining that he was illegally convicted as long ago as February, 1953, of robbery with violence for which he was sentenced to six years' imprisonment and against which conviction he appealed. The appeal was dismissed, the point which is now raised never having been mentioned in the appeal at all. However, we are not going to let that influence our minds.

It was a case of some importance and some interest. It was a case in which two gentlemen from the office of Messrs. Lyons were taking money to the bank in a car, and they were rammed on the way by another car and the money stolen out of the van. It was a most carefully and daringly planned robbery. The principal witness for the Crown was a Mr. Gilbert, whose evidence was that his attention had been attracted when he was in his own house by a performance going on in the road with regard to a car, into which people were getting in and then jumping out. He watched them for some time; his suspicions

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were aroused and he took the number of the car. His suspicions were, if I remember rightly, increased the next day or the day after when the same proceeding went on, and he formed the view that this was a rehearsal, as it turned out to be. Shortly after, sure enough, this robbery took place on a road in the neighbourhood.

One of these men was the present appellant, and he was brought to trial, and the point which he now takes is that in the course of his trial, which lasted four days, for something like twenty minutes—the exact time does not matter, it may have been a quarter of an hour or half an hour—there was not a second Commissioner inside the four walls of the Old Bailey at the time when he was tried. It is said that the whole of the trial was illegal, and therefore the conviction must be quashed.

The matter arises in this way: By the Act of 1834, which set up the Central Criminal Court, section 1 provides who are to be the judges of the Central Criminal Court, and I will read it because it is not always known: “the Lord Mayor for the time being of the City of London”—(he is the senior Commissioner, and therefore the Lord Mayor’s chair is in the centre of the court and is never occupied by anybody but the Lord Mayor)—“the Lord Chancellor or Lord Keeper of the Great Seal, and all the judges for the time being of His Majesty’s Courts of King’s Bench, Common Pleas, and Exchequer”—who are now of course the judges of the High Court of Justice—“the Dean of Arches, the Aldermen of the City of London, the Recorder, the Common Serjeant, the Judges of the Sheriff’s Court of the City of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of His Majesty’s superior Courts of Westminster, together with such others as His Majesty . . . shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the judges of a court to be called the ‘Central Criminal Court,’ to which His Majesty may direct his general commission as hereinafter mentioned; and which court shall have jurisdiction to hear,

try and determine all offences committed or alleged to be committed as hereinafter specified."

Then section 2 provides: ". . . it shall be lawful for His Majesty . . . from time to time to command and cause to be issued commissions of oyer and terminer, to inquire of, hear, and determine all treasons," etc., "within the City of London and County of Middlesex, and [certain] parts of the Counties of Essex, Kent and Surrey"—now called the Central Criminal Court District—"and also commissions of gaol delivery to deliver His Majesty's Gaol of Newgate of the prisoners therein charged with any of the offences aforesaid," etc., "and it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders," etc., "which might be inquired of, heard and determined under any commission of oyer and terminer for the City of London or County of Middlesex, or commission of gaol delivery." So the commission gives power to the justices and judges of the Central Criminal Court, or two or more to try cases, and it is not always appreciated that in strict law any two aldermen, the Lord Mayor and one alderman, or apparently even one alderman can sit and try criminal cases at the Old Bailey, but of course they never do. Ever since the Central Criminal Court has been formed the presiding judges have been the High Court judges who visit it every month, and the City judges, and from time to time the Crown has been pleased on the advice of the Lord Chancellor to include in the Commission at the Old Bailey certain other persons who from time to time sit as Commissioners. Among them Sir Ernest Goodman Roberts, former Chief Justice of Burma, has from time to time been included in the Commission in order to give further assistance to the judges of the Old Bailey when the work was heavy. He was the Commissioner who had been trying this appellant before the incident arose.

What happened on that occasion was this: The court was perfectly properly constituted and always had been, because I should say that it has been the practice of the Old Bailey for

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many years for an alderman always to attend at the Old Bailey in the afternoon. Generally there is one in the morning, but there was always one in the afternoon in case all but one of the judges attending had finished their work, so that there should be two Commissioners in the building at the Old Bailey. On the day in question there was a misunderstanding, and what happened was that the judges other than Sir Ernest Goodman Roberts who were sitting had risen for the day somewhere about four o'clock. At about six minutes past four, Sir Ernest, who was continuing the trial of the appellant, inquired of counsel if they would like a few minutes' adjournment to enable them to have a little rest and get a cup of tea because they were going to sit late, and at six minutes past four he adjourned for a short time. Apparently, as all the three other courts were then up, the alderman, who had been in attendance, thought that meant that the courts were closed for the day, and he left. Sir Ernest, not knowing that the alderman had left, nobody having told him, went back and resumed the hearing of the case. He resumed the hearing of it for, I should think, less than half an hour because the shorthand note clearly shows that only forty-two questions were asked, when the usher came into court and told him that the alderman had left. He then said: "As the alderman has left, I cannot go on sitting; I must rise," so he rose for the day. No further evidence was led by the Crown during this time. Some questions were being put to the witness in cross-examination to suggest that his memory was not very good or that he had not written down the number of the car on the piece of paper on which he said he had, or that he might have written it down on some other piece of paper; but the witness was not shaken. He went on the next day giving evidence, and before he went out of the box counsel had cross-examined him for a period covered by seven pages of the shorthand note. Then the case went on, learned counsel addressed the jury and the case was summed up and verdict was given when the court was properly constituted.

What is the effect of all that? I do not think it is necessary for us to decide now, for a particular reason. I will give in a

moment, whether the court was actually properly constituted or not during the short interval to which I have referred. We are going to assume that it was not. We are going to assume that under this statute, as it speaks of all or any two of the judges, there must be two somewhere, one presiding in court, the other in court or in his room. As one knows, the alderman may be doing useful work elsewhere in the building. The alderman does not have to preside in the court if there is a judge presiding, and whether he might be sitting in his car in the courtyard of the Old Bailey we need not stop to inquire. We need not stop to decide this interesting question because it will never happen again, as last year or the year before I pointed out to the Lord Chancellor how very inconvenient it was that an alderman should always have to be in the precincts of the court. It was particularly inconvenient to the alderman when Cassels J. had a long case which necessitated his sitting in the interval between the two sessions of the Old Bailey. The other judges had all finished their lists and the new session had not begun, but in the week in between the sessions Cassels J. had to go on sitting, and the result was that an alderman had to attend all day, not only in the afternoon but all day.

The reason why the statute is framed in the way in which it is, that is, why it provides for any two of the Commissioners forming a quorum, I have no doubt is, as the judges who heard the case of *LEVERSON v. THE QUEEN* (1869) L.R. 4 Q.B. 394 had no doubt, because the precedent of the Commissions of Assize was followed. A Commission of Assize, as I said during the course of the hearing, is always addressed to certain people, great judicial officers, and others. It is addressed to the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, the Lord Lieutenant, the Lord Chief Justice, the Judges of the Supreme Court and to the Clerk of Assize and his circuit officers. I pointed out to the Lord Chancellor that if the Commission at the Old Bailey contained the words "the Clerk of the Court and his Officers," the necessity of an alderman always having to be in attendance would no longer obtain because they would be persons mentioned in the Commission. Just in the

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same way as the Clerk of Assize on circuit and his officers are mentioned in the Commission, so now the Clerk of the Court at the Central Criminal Court and his officers are mentioned in the Commission, so there will always be two Commissioners present, the judge sitting on the Bench and the clerk of the court sitting below the Bench, which satisfies the highly technical requirement of the statute. So this point can never arise again.

We are going to assume that the point is a good one, and an alderman had necessarily to be there. That does not mean that the whole trial was a nullity. The trial was a perfectly good trial up to the moment when Sir Ernest Goodman Roberts came back into court after giving counsel an adjournment for ten minutes. Then he found after about twenty minutes or so that the alderman had gone, and that therefore the evidence that had been given during that time ought not to have been given, and that is all it comes to. As I said, no evidence was led during that time by the prosecution; all that happened was some desultory cross-examination, which does not seem to any member of the court to have advanced the case by one iota.

Accordingly, what it has really come down to is that certain inadmissible evidence was given. That is just one of the things for which the Criminal Appeal Act, 1907, provides. If inadmissible evidence is given and objection is taken before this court that it ought not to have been given, the court may say: "This evidence was inadmissible and ought not to have been given, but in the opinion of the court no injustice has been caused," and then they are empowered to dismiss the appeal. That is the course we are going to take in this case, because it is absurd to say that the forty-two questions that were asked during the time when the alderman had left the building and was not sitting in his room could have any bearing on this case. The result of the case, no doubt, turned on the identity of the appellant. Mr. Gilbert was giving evidence to show that the appellant was one of the men he had seen rehearsing the robbery somewhere, I think, in the Barnes area. It is quite impossible to say that any miscarriage of justice took place by reason of this evidence being given. The court has already dismissed the

appeal on the ground that there was ample evidence to support the conviction, and they certainly would not regard the evidence given during these twenty minutes as either advancing or retarding the case one iota.

In these circumstances, in our opinion the case comes exactly within the words of the proviso to section 4 (1) of the Act, which are: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal must be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." Without deciding definitely the point of law in favour of the appellant, we are going to assume that it would be decided in favour of the appellant, but we are equally clear that no miscarriage of justice has occurred, and we dismiss the appeal.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN
AND MR. JUSTICE HAVERS

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Mental Deficiency—Carnal Knowledge of Mental Defective—Woman on Licence from Institution—Woman Illegally Detained—What Prosecution Must Prove—Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), ss. 1, 9, 56 (1) (a) (now Sexual Offences Act, 1956 (4 & 5 Eliz. 2, c. 69), s. 8).

The appellant was convicted of carnal knowledge of a woman on licence from an institution for mental defectives, contrary to section 56 (1) (a) of the Mental Deficiency Act, 1913 (now section 8 of the Sexual Offences Act, 1956). An order had been made under section 9 of the Act of 1913 transferring the woman from an approved school to the institution on the ground that

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* In this case the Attorney-General has granted his fiat for appeal to the House of Lords.

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she was a moral defective, but that order was invalid in that she did not satisfy the definition of "moral defective" contained in section 1 of the Act.

Held, that section 56 (1) (a) of the Act of 1913 and the corresponding section of the Act of 1956 could not have any application to the case of a woman who had not been found to be a mental defective under the Act, still less to one who had been unlawfully detained in an institution, though she was being subjected to care and treatment; and if she was being unlawfully detained, she needed no licence to go out. The conviction must, therefore, be quashed.

Where a man is prosecuted for the above-mentioned offence, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act.

Appeal against conviction.

The appellant was convicted at Cumberland Assizes on May 25, 1957, on two charges of carnal knowledge of a mental defective, contrary to section 56 (1) (a) of the Mental Deficiency Act, 1913, and was sentenced by Hinchcliffe J. to concurrent terms of four months' imprisonment.

The woman was at the time of the alleged offence on licence from Dovenby Hall Hospital, an institution for mental defectives. It was not disputed that carnal knowledge had taken place, but the defence was that the woman had never legally been certified as a mental defective, that her detention for care and treatment had been illegal and that consequently she was not subject to any licence, so that no offence had been committed.

In April, 1945, when she was sixteen years of age, she was committed by justices to an approved school under section 72 (3) of the Children Act, 1933. The record of information prepared under the Act stated that her conduct at school gave no trouble, that her school character was good, that she was somewhat forward and that her ability was average, but that her character in employment was unsettled and not satisfactory. Her mental ability was described as apparently normal.

On July 2, 1947, an order was made by the Secretary of State under section 9 of the Mental Deficiency Act, 1913, transferring her from the approved school to an institution for defectives.

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G. D. Guthrie Jones, for the appellant. There was no dispute that sexual intercourse had taken place between the appellant and the woman named in the indictment, and the only questions were (i) whether the woman named was lawfully detained as a mental defective and whether at the time of the intercourse she was on licence from the institution where she had been detained and (ii) whether, if she had been properly detained and let out on licence, the prosecution had proved all the material matters necessary for a conviction.

[The Attorney-General (*Sir Reginald Manningham-Buller*, q.c.). No argument will be addressed to the court to suggest that the order made by the Home Secretary on July 2, 1947, was a valid order.]

[*Rodger Winn*. The Home Office and the Board of Control have been advised that if the order had been challenged by *habeas corpus* or *certiorari* it would have been declared null and void.]

The woman was sent to an approved school, and later an order under section 9 of the Mental Deficiency Act, 1913, was made by the Secretary of State committing her to an institution as a moral defective, and she was classified as such under section 1 (*d*). The Secretary of State acted on two certificates dated June 10, 1947, but neither contained any evidence that she was mentally defective, strongly vicious or possessing criminal propensities. In 1954 she was regarded as a feeble-minded person, but at the trial the doctor who gave evidence for the prosecution said that feeble-minded persons were allowed to marry and that many women with a lower intelligence quotient were leading normal lives. It could make no difference that no proceedings to secure her release from illegal detention had been taken. Her status was that of a

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person who was not lawfully detained as a mental defective, and therefore the appellant could not be guilty of an offence under section 56 (1) (a) of the Mental Deficiency Act, 1913.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.) (*A. S. Booth* with him), for the Crown. No burden has been placed on the Crown by statute of proving the legality of the detention or the legality of orders made subsequently. The only burden is that of proving that the woman was under care or treatment in an institution or certified house or approved home or was placed out on licence therefrom or under guardianship under the Act. This was properly proved in the present case. Even though the documents put in evidence at the trial showed that the detention was illegal, it was still open to the prosecution to prove that the woman was in fact mentally defective, and this was done. Once detention as set out in section 56 (1) (a) had been proved, there was a rebuttable presumption that she was a mental defective, and if the defence showed that the order of detention was illegal, the prosecution were not precluded from proving by further evidence that she was in fact mentally defective.

[THE LORD CHIEF JUSTICE. But that issue was never left to the jury. They were more than once told by the judge that they could not look behind the order. If that is the point on which you rely, the conviction must be quashed.]

The Crown is not so much concerned to uphold the conviction as to dissent from the proposition that it is necessary for the prosecution to prove in the first instance that the woman concerned is a mental defective.

Rodger Winn, for the Home Office and the Board of Control. Once the prosecution has proved that the woman was detained in a prescribed institution or on licence therefrom, the legality or illegality of the detention is immaterial as affecting liability in a prosecution under section 56 (1) (a). Even though the result will be unsatisfactory in the present case, that principle should be applied.

THE LORD CHIEF JUSTICE: The court is clearly of opinion that the conviction will have to be quashed whether the argument of the Attorney-General or the argument of counsel for the appellant is right, but, as the case has ranged over a considerable area and is of importance, the court will take time to consider its judgment and will put it into writing.

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Cur. adv. vult.

November 1. The following judgments were read.

THE LORD CHIEF JUSTICE: This case is one of such importance that the court deems it convenient that they should exercise their powers under section 1 (5) of the Criminal Appeal Act, 1907, and two judgments will be delivered. Havers J. was to have delivered a separate judgment, but he is ill, and he authorises me to say that he agrees with both the judgments about to be delivered.

The court have already allowed the appeal in this case and quashed the conviction and now proceed to give their reasons.

The appellant was convicted before Hinchcliffe J. at the Cumberland Summer Assizes on two counts each charging him with having carnal knowledge of a mental defective contrary to section 56 (1) (a) of the Mental Deficiency Act, 1913, and the particulars charged that on two days in October, 1956, he had carnal knowledge of a woman on licence from Dovenby Hall Hospital, an institution for mental defectives. It was not disputed that the accused had carnal knowledge of the woman on each of the occasions charged or that he knew that she had been an inmate of the institution and was on licence therefrom in the sense that he knew she had been permitted to leave it to go to a school at Keswick as a domestic servant. In fact she had been licensed so to do. The defence was that the woman had never legally been certified as a mental defective, that her detention for care and treatment had been illegal and that consequently she was not subject to any licence, so that no offence had been committed.

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The prosecution called as their first witness the medical superintendent of the hospital, who produced the various orders that had been made in respect of this woman and the relevant documents under which she had been detained for care and treatment, and he proved that he had given her a licence under which she was allowed to leave the hospital on condition that she went out to service at the school. The history obtained from the documents produced showed that in April, 1945, when she was sixteen years old, she was committed by justices to an approved school under section 72 (3) of the Children and Young Persons Act, 1933. She had been brought before the justices under section 62 of that Act by her father, a widower, on his complaint that she was a child whom he was unable to control. The record of information prepared pursuant to section 72 (2) of the Act stated that her conduct at school gave no trouble, that her school character was good, somewhat forward, and her ability average, but her character in employment was unsettled and not satisfactory. The medical report described her mental ability as apparently normal. The justices made an order and she was sent to a Roman Catholic approved school where she stayed until July 2, 1947. On that day an order was made by the Secretary of State under section 9 of the Mental Deficiency Act, 1913, transferring her from the approved school to an institution for defectives. The material words of this section are: "Where the Secretary of State is satisfied from the certificate of two duly qualified practitioners that any person who . . . is undergoing detention in [an approved school] is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives . . . and any order so made shall have the like effect as if it had been made by a judicial authority on petition under this Act."

It is indeed difficult to understand how this order came to be made. The two medical certificates purport to show that the girl was a moral defective and no attention seems to have been paid to the definition of a moral defective in section 1 (1) (d) of the Act. It must be found that there exists "mental defectiveness coupled with strongly vicious or criminal propensities

in a person who requires care, supervision and control for the protection of others." This definition must have been entirely ignored or overlooked both by the certifying medical men and must have escaped the attention also of the Secretary of State and his advisers. There is nothing in the certificates to justify this girl being classed as a moral defective, troublesome, wayward or even immoral though she may have been. The Attorney-General, who has appeared to support the conviction, and Mr. Rodger Winn, who appeared for the Board of Control, as the court on granting leave to appeal asked that they should be represented to give any information that the court might require, both stated that they could not contend that this order was valid. It is indeed disturbing to find that this young woman has been subject to an order classifying her as a moral defective and therefore subject to the provisions of the Act of 1913 from July, 1947, to October 16, 1957, which is now admitted to have been illegal. Had the matter been brought before this court by *certiorari* or on an application for *habeas corpus*, the girl would have been immediately discharged, and the court cannot but regret that the Board of Control, who have the administration of this Act and must be presumed to be thoroughly acquainted with its provisions, have all these years treated the order as valid and apparently never questioned it. They did not discharge the girl until after leave to appeal had been granted by this court and indeed only a few days before the appeal was due to be heard.

Now the material words of the section under which the appellant was charged are: "Any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act" is guilty of an offence. The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care or treatment or that she was out on licence from such an institution.

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He submitted that the section did not require proof that the girl was a defective. Now by section 71 "institution" means "certified institution," and the latter expression means that it is one in respect of which a certificate has been granted to the managers to receive defectives and that must mean defectives under the Act. It is true that paragraphs (b) to (e) of subsection (1) refer in terms to defectives and paragraph (a) does not, no doubt because it would be presumed *prima facie* that a person who was in a certified institution was a defective within the Act. In my opinion the concluding words of the paragraph, the words "under this Act," apply to a girl under care or treatment in an institution and also when placed out on licence as well as to one under guardianship. To put it shortly, unless the woman or girl is a person who has been made subject to the Act, the section does not apply. It cannot, we think, have any application to the case of a woman who had not been found to be a mental defective under the Act, still less to one who is unlawfully detained in an institution though she was being subjected to care and treatment, and if she was unlawfully detained she needed no licence to go out. What the statute is making unlawful is carnal knowledge of a defective and that must mean a mental defective under the Act. As the girl in this case had never been lawfully made subject to the Act, it follows that no offence had been committed. So that there may be no doubt on the matter, I desire to say that where a man is prosecuted for this offence, which is now an offence against section 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act.

DONOVAN J.: I need not repeat the facts. The question of law is whether the woman involved was at the time of the commission of the alleged offence a "defective" within the meaning of section 56 (1) (a) of the Mental Deficiency Act, 1913.

The long title of that Act states its purpose to be the making of further and better provision for the care of feeble-minded and mentally defective persons; and section 1, as subsequently amended, enacts that four classes of persons—which are carefully defined—shall be deemed to be defectives within the meaning of the Act. One of these is as follows: “(d) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others.” Section 2 provides that a person who is a defective may be placed in an institution for defectives. Here the expression “who is a defective” must, as a matter of construction, mean a person in one of the four categories defined in section 1.

Section 4 of the Act lays down how defectives, other than those dealt with at the instance of their parent or guardian, are to be dealt with. An order may be made by a judicial authority (defined in section 19), a court, or the Secretary of State according to the circumstances. Sections 5 to 9 lay down precise requirements for the making of such orders; and sections 10 to 12 deal with their effect and duration; section 11 contains powers for the making of further orders on the expiration of the original or later order.

Section 41 gives power to the Secretary of State to make regulations about a number of matters including—see subparagraph (h) of subsection (1)—“the absence of patients from institutions under licence or temporarily without licence.” Since the woman involved in the present case was away from the institution on licence, it is perhaps desirable to say in passing that the expression “patient” is used in various subparagraphs of section 41 (1) and is obviously used as a synonym for “defective.” See also section 42, section 49 (2) and section 51 (3), where the same thing occurs.

Then one comes to Part IV of the Act headed “General Offences, legal proceedings, etc.,” in which section 56 finds its place. Section 56 (1) (a) reads thus: “Any person who unlawfully and carnally knows, or attempts to have unlawful

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carnal knowledge of any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act shall be guilty of a misdemeanour and shall be liable upon conviction on indictment to be imprisoned . . . for any term not exceeding two years unless he proves that he did not know, and had no reason to suspect, that the woman or girl was a defective.”

It is clear, from the earlier sections of the Act to which I have referred, that section 56 (1) (a) is dealing with “defectives” who are under care and treatment, etc., though that word is not actually used in sub-paragraph (a) as it is in each of the four succeeding paragraphs. But the concluding words of the section giving a defence to a man if he did not know or suspect that the girl or woman was a defective, place the matter beyond all doubt; and indeed the prosecution suggest no other view.

If, then, section 56 (1) (a) is dealing with defectives, what is a defective? It must mean a person who has been found to belong to one of the four categories of defectives specified in section 1, and who is, in consequence of an order made under the Act, having care or treatment in an institution, or is out on licence by virtue of regulations made under the Act. That leads to the question: Was this woman a defective? and the answer is: No, because she was not found to belong to one of the said four categories, and was therefore not “a defective within the meaning of this Act.” See section 1. She was placed in a category which is unknown to the Act. The prosecution was therefore never competent from the outset, since the woman lacked the necessary status to bring section 56 into operation.

The Attorney-General argued that this defect was cured because there was unchallenged medical evidence at the trial that the girl was in fact a mental defective. So he says that fact, coupled with proof that she was out on licence from the institution, validates the prosecution. The answer to this is that, whether she was mentally defective or not, she was not a

defective within the meaning of the Act, since at the time of the alleged offence (which is the material time) she had never been classified as section 1 requires and as the language of section 9 also necessitates before an order can be made. This defect in the prosecution's case was fundamental, and could not be cured at the trial by offering to prove there and then that she *could have been* placed in one or other of the categories specified in section 1. Section 56 does not deal with potential "defectives," but only with those in whose case the classification prescribed by the Act has taken place, followed by an appropriate order under the Act.

For the like reason, the re-classification of the woman as a feeble-minded person which Dr. Ferguson apparently made of his own motion in 1954 is also ineffectual, even if valid. One reason why I add that last qualification is because of the explanation given by Dr. Ferguson for his action. "I am not very keen on this moral defective," he is reported as saying, "it is very difficult."

The Attorney-General was anxious to avoid prosecutions under this section involving a trial within a trial to determine the legality of the patient's detention. As I see it, however, that question is not really the issue. Illegality of detention is simply a consequence which flows from any failure to give a person the status of a defective under the Act. At the same time I agree that the expression "under care or treatment in an institution or certified house or approved home, or while placed out on licence therefrom or under guardianship" in section 56 (1) (a) means that the woman or girl is lawfully so being dealt with. It is not to be supposed that Parliament was legislating for persons unlawfully detained in mental institutions, and in any event the words which follow those I have quoted make the matter clear. They are "*under this Act*," which are in my view to be read distributively, and so apply to the expression "under care and treatment" and to the expression "whilst placed out on licence."

Accordingly, I think the prosecution were right to produce the various documents relating to the woman's detention, and

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to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose.

Finally, upon the whole case I desire to associate myself with the comments which have fallen from the Lord Chief Justice.

Conviction quashed.

Solicitor: The Solicitor, Ministry of Health, for the Home Office and the Board of Control.

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